

1 UNITED STATES DISTRICT COURT  
 2 EASTERN DISTRICT OF NORTH CAROLINA  
 3 EASTERN DIVISION

4 Wai Man Tom, - Docket No. 5:17-cv-98-FL  
 5 Plaintiff, - New Bern, North Carolina  
 6 v. - April 24, 2018  
 7 Hospitality Ventures, - Motion Hearing  
 8 LLC, et al., -  
 9 Defendants. -  
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10 TRANSCRIPT OF MOTION HEARING  
 11 BEFORE THE HONORABLE LOUISE WOOD FLANAGAN  
 12 UNITED STATES DISTRICT JUDGE.

13 APPEARANCES:

14 For the Plaintiffs: Gilda A. Hernandez  
 15 Michael B. Cohen

16 For the Defendant: John R. Hunt  
 17 Jordan D. Fishman  
 18 Susanna Gibbons  
 19 Debbie DeWar

20 Court Reporter: Tracy L. McGurk, RMR, CRR  
 21 413 Middle St.  
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 24  
 25

Proceedings recorded by mechanical stenography,  
 transcript produced by notereading.

00:34:01 1 (Commenced at 9:21 a.m.)

00:34:01 2 THE COURT: Good morning. Would the clerk

00:34:02 3 call the calendar. And, counsel, I'll invite you to

00:34:06 4 introduce yourselves on the record.

00:34:09 5 THE CLERK: The Court calls for motion

00:34:10 6 hearing the case of Wai Man Tom versus Hospitality

00:34:14 7 Ventures, LLC, doing business as Umstead Hotel and Spa,

00:34:19 8 SAS Institute, Inc., and NRC Cuisine Ventures doing

00:34:25 9 business as An Asian Cuisine, case 5:17-CV-98 FL.

00:34:32 10 THE COURT: For the plaintiff?

00:34:34 11 MS. HERNANDEZ: Jill Hernandez for the

00:34:39 12 plaintiffs.

00:34:39 13 MR. COHEN: Michael Cohen for the plaintiffs.

00:34:42 14 MR. HUNT: John Hunt for the defendants.

00:34:45 15 MS. FISHMAN: Jordan Fishman for the

00:34:47 16 defendants.

00:34:48 17 MS. GIBBONS: Susie Gibbons for the

00:34:53 18 defendants.

00:34:54 19 THE COURT: You've got your paralegal

00:34:55 20 between you. And who is behind you?

00:34:55 21 MS. DeWAR: Good morning, Your Honor.

00:35:04 22 Debbie DeWar, in-house counsel.

00:35:06 23 THE COURT: Did you want to sit at the

00:35:08 24 table?

00:35:09 25 This is plaintiff's motion. The Court is

00:35:10 1 familiar with the paperwork that's been submitted in  
00:35:13 2 support and in opposition to it.

00:35:15 3 Is there anything you want to highlight in  
00:35:17 4 opening statement, Ms. Hernandez?

00:35:18 5 MS. HERNANDEZ: Yes, Your Honor. Thank you  
00:35:19 6 very much. First and foremost, thank you so much for  
00:35:23 7 hearing the plaintiff's motion on an emergency basis.  
00:35:25 8 I'd also like to introduce the Court to the witness for  
00:35:28 9 the plaintiffs, Mr. Justin Dillon, who is here to answer  
00:35:31 10 any questions that the Court may have.

00:35:35 11 Your Honor, just a little bit of background.  
00:35:37 12 Obviously the Court knows that on March 15, 2018 the  
00:35:40 13 plaintiffs filed a motion for a conditional class  
00:35:43 14 certification pursuant to the FLSA and Rule 23.

00:35:47 15 On March 19, Your Honor, plaintiff's counsel  
00:35:50 16 learned that while this action has been pending for over  
00:35:52 17 one year, and a motion for conditional class  
00:35:56 18 certification was pending, defendant's counsel engaged  
00:35:59 19 in potentially improper communications with putative  
00:36:02 20 plaintiffs and class members.

00:36:03 21 Specifically on March 19, 2018, we received  
00:36:06 22 a phone call from witness, Mr. Justin Dillon, whom  
00:36:10 23 plaintiff's counsel had never spoken with before or met  
00:36:14 24 in person up until the 19th. We received a phone call  
00:36:17 25 from him -- he is not an opt-in plaintiff at this time,

00:36:22 1 but he is a putative Rule 23 class member -- indicating  
00:36:25 2 that he had been contacted by defendant's counsel whom  
00:36:28 3 he later confirmed represented defendant An. He  
00:36:31 4 contacted us and stated that he had just finished  
00:36:34 5 meeting with the attorneys who he later confirmed or  
00:36:37 6 understood represent defendant An.

00:36:40 7 According to Mr. Dillon, Your Honor, after  
00:36:42 8 speaking with counsel for defendants he walked away  
00:36:45 9 feeling completely confused by his communications with  
00:36:47 10 them and essentially did not understand the nature of  
00:36:51 11 those communications or the purpose of that meeting,  
00:36:54 12 Your Honor.

00:36:55 13 Defendant's one-sided communications with  
00:36:57 14 putative class members have the potential to eliminate  
00:37:02 15 the majority of the potential class when they are  
00:37:05 16 agreeing to speak with the defendant's counsel, signing  
00:37:08 17 statements without being fully informed of all of the  
00:37:13 18 relevant facts, the status of the pending action, or  
00:37:15 19 their legal rights.

00:37:17 20 Defendant's one-sided communications with  
00:37:20 21 putative counsel -- I'm sorry, with the putative class  
00:37:24 22 have actually, again, actually limited or have the  
00:37:28 23 potential to limit or eliminate their potential recovery  
00:37:32 24 in this action.

00:37:33 25 Your Honor, to be clear, plaintiffs are not

00:37:38 1 here to argue that the employers may not communicate  
00:37:41 2 with putative plaintiffs in most circumstances, but this  
00:37:44 3 is one of those exceptions due to the nature of such  
00:37:47 4 communications which have caused confusion,  
00:37:51 5 misrepresenting the status of the action, the effect of  
00:37:54 6 the pending case. And given the pending motion for  
00:37:58 7 notice, which if the Court granted such motion would  
00:38:02 8 provide the putative plaintiffs and the Rule 23 class  
00:38:05 9 members with impartial Court-authorized notice,  
00:38:11 10 eliminating and avoiding any issues that have prompted  
00:38:15 11 this motion for protective order.

00:38:18 12 Now, Your Honor, in terms of the governing  
00:38:23 13 principles in terms the of limiting communications,  
00:38:26 14 courts all agree that they have the authority to control  
00:38:30 15 the communications with class members. These general  
00:38:34 16 principles were established by the Supreme Court in Gulf  
00:38:38 17 Oil versus Bernard. In applying the standard pronounced  
00:38:43 18 in Gulf Oil, the Court must first determine whether  
00:38:46 19 limitation on defendant's communication with putative  
00:38:49 20 class members is necessary.

00:38:51 21 As addressed in Slavinski versus Columbia  
00:38:55 22 Association, a Fourth Circuit District Court case from  
00:38:57 23 2011, the Court determines that first the movant must  
00:39:01 24 show that a particular form of communication has  
00:39:05 25 occurred or is threatened to occur. Second, the movant

00:39:09 1 must show that the particular form of communication at  
00:39:13 2 issue is abusive in that it threatens the proper  
00:39:18 3 functioning of the litigation. A moving party must show  
00:39:22 4 that not only that the communication has occurred or is  
00:39:26 5 threatened to occur but that the particular form of  
00:39:29 6 communication is abusive. Some of those abusive  
00:39:32 7 practices that have been considered sufficient to  
00:39:35 8 warrant a protective order include communications that  
00:39:38 9 misrepresent the status or the effect of the pending  
00:39:41 10 litigation. They have an obvious potential for  
00:39:44 11 confusion. They can otherwise be characterized as  
00:39:51 12 false, misleading or intimidating or are communications  
00:39:55 13 which can undermine the cooperation or confidence in  
00:39:58 14 class counsel, Your Honor.

00:39:59 15 And in some of the cases, one in particular  
00:40:01 16 that comes to mind and is so analogous to the facts in  
00:40:05 17 this case, and even in that case, Your Honor, the  
00:40:09 18 defendant's counsel in communicating with putative class  
00:40:12 19 members actually did so much more, communicated so much  
00:40:17 20 more to putative class members than was done in this  
00:40:20 21 case. And that case that I'm referring to, Your Honor,  
00:40:22 22 is Quezada versus Schneider Logistics Transloading.  
00:40:28 23 It's a 2013 case, Your Honor. And prior to beginning  
00:40:33 24 the conversation with putative class members --

00:40:36 25 THE COURT: I didn't find that case very

00:40:41 1 similar to the facts here. I recall in that case  
00:40:46 2 meetings with current employees were held in a manager's  
00:40:51 3 office during work hours, and employees were ordered to  
00:40:55 4 report to those meetings either over a loudspeaker or by  
00:40:58 5 having a supervisor escort them. I don't think that's  
00:41:01 6 one of your better cases.

00:41:03 7 You're really recapping your written  
00:41:05 8 material. This is an opening statement. Is there  
00:41:10 9 anything that you would in particular seek to highlight?

00:41:15 10 MS. HERNANDEZ: Absolutely, Your Honor. I  
00:41:16 11 will simply say that in terms of determining whether  
00:41:19 12 precertification communications between the employees  
00:41:22 13 and the employers are sufficiently deceptive or coercive  
00:41:26 14 warranting relief, the Courts have considered several  
00:41:29 15 factors, including whether an employer adequately  
00:41:32 16 informed the employees about the details of the  
00:41:35 17 underlying suit, the nature and purpose of the  
00:41:37 18 communication, and the fact that any defense attorneys  
00:41:41 19 conducting the communications represent the employer and  
00:41:44 20 not the employee.

00:41:45 21 Now, Your Honor, one thing that I would like  
00:41:46 22 to highlight about Quezada is that the Court found while  
00:41:51 23 defendant's counsel had provided a great deal of detail,  
00:41:54 24 they failed to simply advise these individuals that the  
00:41:59 25 information being collected would be utilized, for the

00:42:03 1 purpose of the interviews, to gather evidence and to be  
00:42:07 2 used against the employees in the lawsuit. They were  
00:42:11 3 not even told that the document they were going to be  
00:42:13 4 asked to sign at the close of the interview was a sworn  
00:42:16 5 declaration, nor were they apprised of the significance  
00:42:19 6 of signing a declaration under penalty of perjury.

00:42:22 7 Those are the types of issues that happened  
00:42:25 8 in this case, Your Honor. In this case the  
00:42:27 9 communications with Mr. Dillon, who's a putative class  
00:42:32 10 member --

00:42:33 11 THE COURT: Mr. Dillon, why don't you step  
00:42:36 12 outside the room. I'd rather hear your testimony  
00:42:38 13 without the forecast of what you're going to say. And  
00:42:42 14 we'll get you right back in as soon as opening statement  
00:42:46 15 is done.

00:42:46 16 (Mr. Dillon exits the courtroom.)

00:42:49 17 THE COURT: Okay. What is he going to say?

00:42:52 18 MS. HERNANDEZ: So in this case, Your Honor,  
00:42:54 19 as you can see, you could even see from the  
00:42:56 20 transcription, just the lack of information, just at the  
00:43:03 21 outset when Ms. Erin Whitlock, a paralegal for the  
00:43:08 22 defendants, did not even communicate thoroughly the  
00:43:10 23 nature of the action, did not communicate thoroughly how  
00:43:14 24 the pending status of the action could affect him, did  
00:43:17 25 not explain the nature of Wai Man Tom's, the named



00:43:24 1 plaintiff's, allegations, how he was representing not  
00:43:26 2 just himself but putative plaintiffs. And more  
00:43:29 3 importantly, Your Honor, there's no question that from  
00:43:31 4 the transcription Mr. Dillon was confused about who he  
00:43:36 5 was speaking to and even said: Well, I'm good friends  
00:43:40 6 with Brandon Kelly.

00:43:43 7 At that point, Your Honor, I think the  
00:43:44 8 defendants' counsel and their staff should have been on  
00:43:49 9 notice to be entirely truthful, transparent, and candid  
00:43:54 10 about all of these things, even if they had to  
00:43:56 11 repeatedly explain who they represented.

00:44:00 12 Your Honor, I mean, I could go into again  
00:44:03 13 just the main point on their failures. I mean, Mr.  
00:44:08 14 Dillon was not advised that the document he was asked to  
00:44:12 15 sign at the close of the interview was a sworn  
00:44:16 16 declaration. They did not, again, thoroughly explain  
00:44:18 17 the nature of the lawsuit, did not explain how the  
00:44:23 18 purpose of that meeting with him was to use the  
00:44:27 19 information for gathering purposes and to be utilized  
00:44:32 20 against him potentially and how it could limit his  
00:44:35 21 recovery should the class be certified. And these are  
00:44:38 22 all communications which are fundamentally misleading  
00:44:42 23 and deceptive because he clearly was unaware that the  
00:44:46 24 interview was taking place in an adversarial context and  
00:44:50 25 that his statement could be used to limit his own relief

00:44:54 1 as a putative plaintiff class member.

00:44:57 2 And now in terms of what defendant's counsel  
00:45:00 3 have said, they simply said to him: We're calling about  
00:45:03 4 the lawsuit involving An. Ms. Fishman explained in  
00:45:10 5 vague terms a lawsuit was going on. So the details go  
00:45:12 6 on and on.

00:45:13 7 I certainly do not want to belabor or  
00:45:16 8 reiterate the points that have been raised in  
00:45:18 9 plaintiff's brief in support of the motion for  
00:45:21 10 protective order, but just from comparing, again, the  
00:45:25 11 transcription and how he was very candid about feeling  
00:45:30 12 frustrated that not just himself but other servers felt  
00:45:34 13 frustrated that they were having to tip out to  
00:45:38 14 individuals that were not even stepping floor in the  
00:45:42 15 front of the house, those are all details -- I mean,  
00:45:44 16 that transcription was so lengthy compared to this  
00:45:49 17 declaration that he signed.

00:45:50 18 THE COURT: Would you agree with me that the  
00:45:55 19 standard for judicial intervention is whether the  
00:45:59 20 defendant misrepresented the status or effect of this  
00:46:04 21 action, whether the communications had an obvious  
00:46:09 22 potential for confusion, whether they were misleading,  
00:46:12 23 intimidating, or coercive? Isn't that what this hearing  
00:46:16 24 is all about?

00:46:17 25 MS. HERNANDEZ: Yes, it is, Your Honor.

00:46:18 1 THE COURT: Not about whether there was a  
00:46:22 2 mere lack of clarity on the part of defense counsel, or  
00:46:26 3 a failure to provide a copy of the affidavit, or a lack  
00:46:30 4 of thorough explanation? Would you agree with me that  
00:46:33 5 those items are not sufficient to meet this standard for  
00:46:37 6 judicial intervention that's set forth in Gulf Oil and  
00:46:42 7 is described in the Manual for Complex Litigation?

00:46:45 8 MS. HERNANDEZ: I would agree with that,  
00:46:47 9 Your Honor.

00:46:47 10 THE COURT: All right. Thank you very much.  
00:46:48 11 Let's hear from the defendant briefly, then  
00:46:50 12 we'll let the plaintiff call the first witness.

00:46:52 13 MR. HUNT: Thank you, Your Honor. We also  
00:46:55 14 agree that that's the proper, appropriate standard for  
00:46:59 15 judicial intervention.

00:47:00 16 And in this case, just briefly, there was  
00:47:04 17 absolutely nothing impermissible in our interviewing or  
00:47:07 18 attempting to obtain a statement from Mr. Dillon, or  
00:47:11 19 anyone else for that matter, who has not filed a consent  
00:47:15 20 to sue, was not represented by the plaintiffs. There's  
00:47:20 21 been no certification in this action. And under the  
00:47:23 22 current law, it's more universally recognized defendants  
00:47:30 23 can and probably should attempt to interview people that  
00:47:35 24 potentially might be members of a class.

00:47:38 25 Moreover, there's no evidence that there was

00:47:41 1 any kind of coercion or intimidation. Mr. Dillon, he  
00:47:47 2 doesn't currently work for any of the defendants.  
00:47:49 3 That's, I think a fact which distinguishes his situation  
00:47:54 4 from a substantial number of the cases that the  
00:47:58 5 plaintiffs have attempted to rely on in their brief.

00:48:02 6 In addition to that, there wasn't any  
00:48:03 7 evidence that there was any offer by the defendants to  
00:48:07 8 try to settle the case or compromise his claim. There's  
00:48:11 9 no evidence that he was told not to participate in the  
00:48:16 10 case or not to file a consent to sue or that somehow he  
00:48:21 11 was intimidated into meeting with Ms. Fishman and Ms.  
00:48:27 12 Whitlock at a public place in downtown Raleigh. What  
00:48:32 13 the evidence does show is that he voluntarily spoke with  
00:48:37 14 Ms. Whitlock on two occasions, and he voluntarily  
00:48:43 15 engaged in a series of text message communications with  
00:48:46 16 her. He also voluntarily agreed to meet with Ms.  
00:48:50 17 Whitlock and Ms. Fishman, and he did so. He met at the  
00:48:55 18 Starbucks. And even according to the affidavit that he  
00:49:00 19 submitted to Your Honor in connection with the  
00:49:04 20 plaintiff's motion, he understood, at least even if he  
00:49:10 21 somehow was initially confused, which I don't think was  
00:49:13 22 the case, but even buying that, that he initially was  
00:49:17 23 confused, he knew halfway through the conversation -- he  
00:49:20 24 said this in the affidavit he gave to Ms. Hernandez --  
00:49:24 25 that he fully understood that Ms. Whitlock and Ms.

00:49:27 1 Fishman were representing the defendants in the case;  
00:49:29 2 and nonetheless, he continued with the interview. He  
00:49:35 3 then provided them with a written statement with a  
00:49:40 4 declaration. He also, according to the affidavit that  
00:49:43 5 he provided to plaintiff's counsel, edited that  
00:49:46 6 affidavit and made whatever changes he wanted.

00:49:51 7 THE COURT: Do you know -- do you have the  
00:49:53 8 original affidavit that he made changes on and returned?

00:49:57 9 MR. HUNT: He made them on the computer as  
00:50:01 10 this was being done, so we don't have the actual  
00:50:06 11 document. What occurred was when they met with him at  
00:50:10 12 Starbucks, Ms. Fishman was preparing the affidavit as he  
00:50:13 13 was talking based on his comments. Then I believe the  
00:50:18 14 testimony will be she showed him the computer, and he  
00:50:22 15 made changes.

00:50:22 16 THE COURT: He can testify to that if he  
00:50:24 17 remembers.

00:50:24 18 MR. HUNT: In addition to that, then  
00:50:26 19 sometime after he spoke to plaintiff's counsel, in fact,  
00:50:30 20 the evidence will show that he went ahead and asked for  
00:50:35 21 a copy of the affidavit, which he got. It wasn't  
00:50:39 22 initially sent to him because of inadvertence, but it  
00:50:43 23 was sent to him. And although he said he initially  
00:50:45 24 wanted to make changes, he sent Ms. Whitlock a text  
00:50:50 25 saying he didn't want to make any changes. So that

00:50:53 1 occurred voluntarily as well. There wasn't any  
00:50:59 2 compulsion on his part to reach out to us to do so.

00:51:03 3 So the defendant's position is they had a  
00:51:05 4 First Amendment right to communicate with Mr. Dillon.  
00:51:08 5 He's not represented by counsel. And there's nothing  
00:51:12 6 remotely approaching any kind of miscommunication,  
00:51:16 7 coercion. And asking open ended questions about the  
00:51:20 8 facts of the case certainly doesn't -- isn't the  
00:51:24 9 equivalent of coercion, and asking open-ended questions  
00:51:27 10 about the factual basis or about the facts involved in  
00:51:31 11 this case also doesn't make those questions misleading.  
00:51:34 12 So we think that this simply is a witness interview that  
00:51:39 13 happens hundreds of times day across the country in all  
00:51:43 14 kinds of different litigation, and we respectfully ask  
00:51:46 15 that the motion be denied.

00:51:48 16 THE COURT: Well, I'll preface going forward  
00:51:50 17 with some language from the Fourth Circuit. I haven't  
00:51:54 18 found a case where the Fourth Circuit addressed directly  
00:51:57 19 the type of abuse that may trigger District Court  
00:52:00 20 intervention in the form of a limiting order, but I did  
00:52:04 21 find a case where the Fourth Circuit recently commented  
00:52:06 22 upon conduct by an employer defendant in the context of  
00:52:11 23 a motion to compel arbitration in the class action case.  
00:52:15 24 But does my survey of the Fourth Circuit match yours?  
00:52:20 25 Have you found a decision by the Fourth Circuit that's

00:52:23 1 on point here?

00:52:24 2 MS. HERNANDEZ: No. No, Your Honor, not  
00:52:26 3 necessarily other than some district court cases.

00:52:28 4 THE COURT: Okay. Have you?

00:52:30 5 MR. HUNT: No, Your Honor. There are some  
00:52:32 6 District Court cases, I believe, which we cited in our  
00:52:36 7 brief with the proposition that it's acceptable to speak  
00:52:40 8 with class members or putative class members prior to  
00:52:45 9 certification.

00:52:47 10 THE COURT: Well, in that DeGidio versus  
00:52:53 11 Crazy Horse Saloon case, which is a case this year, the  
00:52:59 12 Court noted that the employer was disdainful of orderly  
00:53:05 13 judicial process and lacking in the respect that  
00:53:07 14 opposing parties in an adversary proceeding are due. It  
00:53:13 15 found under the facts there that Crazy Horse didn't  
00:53:15 16 inform that it was communicating with potential class  
00:53:21 17 members about pending litigation; it didn't tell the  
00:53:27 18 Court.

00:53:27 19 But the Court goes on to talk about the FLSA  
00:53:30 20 opt-in requirement, that it was enacted in response to  
00:53:35 21 excessive litigation spawned by plaintiffs lacking a  
00:53:40 22 personal interest in the outcome.

00:53:44 23 The requirement seeks to balance employees'  
00:53:50 24 interest in pooling resources to bring collective  
00:53:53 25 actions and employers' interests in reducing baseless

00:53:56 1 lawsuits. In order to strike this balance, District  
00:54:00 2 Courts must be able to supervise contacts between the  
00:54:03 3 parties and their respective counsel to insure that  
00:54:07 4 potential plaintiffs are not misled about the  
00:54:10 5 consequences of joining a class in an ongoing employment  
00:54:15 6 dispute. The Court's supervisory role helps to insure  
00:54:20 7 that employees receive accurate and timely notice so  
00:54:23 8 that they can make informed decisions about whether to  
00:54:26 9 participate.

00:54:27 10 I think some of that language is helpful  
00:54:29 11 here. And we come back to the fact that what's in front  
00:54:32 12 of me isn't whether there was a lack of clarity in and  
00:54:39 13 of itself, but it's whether it really strikes to the  
00:54:44 14 heart of coercive or misleading or intended to confuse,  
00:54:54 15 intimidating. So that's what I've got in my mind. And  
00:54:58 16 I think both sides agree that that's what I should be  
00:55:03 17 looking at. The communications must be said to  
00:55:08 18 misrepresent the status or effect of the pending action,  
00:55:12 19 have an obvious potential for confusion, misleading,  
00:55:16 20 intimidating, or coercive.

00:55:18 21 So why don't you go and get your witness,  
00:55:20 22 and we'll invite him to come up to the bench.

00:55:24 23 Please tell him to watch his step. We lose  
00:55:27 24 a few people when we go from the wooden floor to the  
00:55:30 25 carpet.



00:55:30 1 MS. HERNANDEZ: You would want him --

00:55:33 2 THE COURT: He's going to come straight up  
00:55:35 3 to Ms. Collins. She's going to administer the oath,  
00:55:38 4 then he's going to go into the witness box.

00:56:11 5 THE CLERK: Please place your left hand on  
00:56:14 6 the Bible and raise your right hand. State your name  
00:56:16 7 for the Court.

00:56:18 8 THE WITNESS: Justin Dillon, J-u-s-t-i-n  
00:56:25 9 D-i-l-l-o-n.

00:56:25 10 (Whereupon the witness was sworn by the  
00:56:33 11 clerk.)

00:56:33 12 THE CLERK: Please take the witness stand.

00:56:43 13 THE COURT: I'm going to invite Ms. Hernandez to ask you  
00:56:45 14 some questions. Then when she's finished, counsel for  
00:56:48 15 the defendant has a chance to ask you questions as well.

00:56:50 16 Please proceed.

00:56:50 17 - - -

00:56:50 18 JUSTIN DILLON, DIRECT EXAMINATION

00:56:52 19 BY MS. HERNANDEZ:

00:56:52 20 Q. Thank you, Your Honor.

00:56:56 21 Mr. Dillon, thank you so much for taking the time  
00:56:59 22 to be here today.

00:57:04 23 THE COURT: You can question the witness  
00:57:06 24 while seated.

00:57:07 25 MS. HERNANDEZ: Thank you.

00:57:10 1 BY MS. HERNANDEZ:

00:57:10 2 Q. Mr. Dillon, when you first heard from defendant's  
00:57:14 3 counsel, do you recall who exactly contacted you and  
00:57:19 4 what they said in reference to this matter?

00:57:22 5 A. After relooking through the phone messages, I  
00:57:27 6 knew a name but not a face to the name. And it was --  
00:57:30 7 that's pretty much all I got out of it. I didn't really  
00:57:33 8 know exactly who represented who. As I stated in my  
00:57:38 9 text, I was more than happy to be a part of this if it  
00:57:42 10 was going to actually come of some sort to where people  
00:57:49 11 were being held accountable for what was happening.

00:57:53 12 Q. And when you subsequently spoke to someone  
00:57:56 13 representing the defendant's counsel, do you recall  
00:58:01 14 whether you called them or they called you? And how  
00:58:04 15 did they introduce themselves to you?

00:58:06 16 A. Well, they called me. I missed the call and I  
00:58:09 17 called them back. Then it was pretty much a --

00:58:12 18 THE COURT: Can you give me a name?

00:58:16 19 THE WITNESS: Erin Whitlock was the name  
00:58:18 20 that was on the text. I don't necessarily remember who  
00:58:20 21 I was talking to whenever I was on the phone. It was a  
00:58:23 22 very brief conversation. And for the most part -- they  
00:58:30 23 asked me a couple questions and asked to meet me at  
00:58:32 24 Starbucks.

00:58:34 25 BY MS. HERNANDEZ:

00:58:34 1 Q. Do you recall if they explained the nature of the  
00:58:37 2 lawsuit?

00:58:38 3 A. No, they did not give me any paperwork, any  
00:58:41 4 information. They just said that it just had to deal  
00:58:44 5 with the lawsuit that I had already known about from the  
00:58:47 6 year prior, so.

00:58:48 7 Q. Did you know a year prior what the lawsuit was  
00:58:51 8 about?

00:58:51 9 A. I thought it was for back wages. And then it  
00:58:56 10 turned into -- until I came to your office, I did not  
00:59:01 11 even understand that it had to do with anything being,  
00:59:04 12 like, tip pool and stuff like that.

00:59:04 13 (Whereupon Ms. Whitlock and Ms. Fishman exit the  
00:59:04 14 courtroom.)

00:59:10 15 Q. I'm sorry. Could you please repeat that?

00:59:11 16 A. Until I met with you, I did not know what the  
00:59:14 17 actual real true nature of the lawsuit was.

00:59:20 18 Q. So did they explain to you -- so when you say  
00:59:25 19 that you learned about the case being about back wages,  
00:59:27 20 is that something that they communicated to you?

00:59:29 21 A. Before I had quit, Brandon and Wai had already  
00:59:34 22 mentioned that they were going to pursue this. And then  
00:59:38 23 a year later is when they contacted me. So then I had  
00:59:42 24 actually had your contact information from when they  
00:59:45 25 asked if anybody wanted to join. And then I had called

00:59:49 1 you because how I felt whenever I left with them.

00:59:52 2 Q. And how did you feel when you left the meeting  
00:59:55 3 with the defendant's counsel?

00:59:57 4 A. That they were trying to sway my words to be  
01:00:03 5 different -- they would take three sentences and write  
01:00:06 6 it into one. And the context of what I was reading was  
01:00:09 7 not what I said.

01:00:10 8 Q. Did they explain to you the significance of  
01:00:17 9 signing a declaration under penalty of perjury?

01:00:21 10 A. No. They didn't even give me a copy of it.

01:00:25 11 Q. Did they offer you a copy of the declaration?

01:00:28 12 A. No. The printer wasn't working. She walked off;  
01:00:31 13 she printed off one copy and brought it back to the  
01:00:36 14 table. This is after I had already gone through and  
01:00:38 15 taken off about two and a half pages of what they had  
01:00:42 16 written down. And I actually didn't really realize they  
01:00:45 17 were actually, like, typing what I was saying because I  
01:00:49 18 was focused on one person while the other person was  
01:00:52 19 writing. Then they said: Would you like to review  
01:00:55 20 it -- no, halfway through I realized what they said.  
01:00:57 21 And I was, like, may I review this? Then I just started  
01:01:01 22 deleting all kinds of stuff because it just seemed  
01:01:04 23 really fishy. They had really weird questions that they  
01:01:10 24 were asking. And it started to really, like, bring up a  
01:01:14 25 little bit of doubt in my mind on what was actually

01:01:17 1 happening.

01:01:17 2 Q. Did they explain to you the nature of the meeting  
01:01:19 3 with you?

01:01:20 4 A. No. They didn't give me any paperwork. They  
01:01:23 5 didn't give me any -- no. No.

01:01:28 6 Q. Did they explain to you -- did they show you a  
01:01:31 7 copy of the first amended complaint in this lawsuit?

01:01:33 8 A. No. I would have had it.

01:01:35 9 Q. Did they explain to you at all the nature of the  
01:01:38 10 named plaintiff's allegations in this lawsuit?

01:01:40 11 A. No.

01:01:41 12 Q. Did they explain to you that they would be  
01:01:45 13 utilizing the information gathered from you against the  
01:01:51 14 plaintiff's in this lawsuit or potentially in this  
01:01:54 15 lawsuit?

01:01:55 16 MR. HUNT: Objection. Leading.

01:01:56 17 THE COURT: Sustained.

01:02:00 18 BY MS. HERNANDEZ:

01:02:00 19 Q. Did they explain to you that they would be  
01:02:04 20 utilizing a declaration signed by you in this lawsuit?

01:02:08 21 A. No.

01:02:11 22 Q. Did they explain to you that you could be a  
01:02:16 23 potential Rule 23 class member in this lawsuit?

01:02:19 24 A. No.

01:02:20 25 MR. HUNT: Objection. Leading.

01:02:23 1 THE COURT: Overruled.

01:02:26 2 Q. Did they explain to you that you had a right to  
01:02:29 3 confer with an attorney before signing a declaration?

01:02:33 4 A. No.

01:02:35 5 Q. Did they explain to you that you had a right to  
01:02:37 6 have an attorney present during the course of the  
01:02:41 7 communications with them?

01:02:43 8 A. No.

01:02:43 9 MR. HUNT: Objection.

01:02:44 10 THE COURT: Overruled.

01:02:50 11 A. They didn't tell me anything. We just talked and  
01:02:52 12 had a casual conversation, and they started asking me  
01:02:56 13 questions. And about halfway through it got really --  
01:02:58 14 when they started asking about sushi chefs speaking  
01:03:02 15 English, I started realizing what was going on. Because  
01:03:06 16 it made no sense to me, and I still don't even  
01:03:09 17 understand why the sushi chefs even needed to speak  
01:03:14 18 English, except we spoke about it that they were tipped  
01:03:17 19 out as well. None of it made sense until -- they were  
01:03:20 20 very vague, broad questions at first then got very  
01:03:23 21 detailed at the very end.

01:03:25 22 Q. Did you feel somewhat -- did you feel confused?

01:03:28 23 MR. HUNT: Objection. Leading.

01:03:30 24 A. I didn't know what was going on.

01:03:32 25 THE COURT: That is a leading question.

01:03:33 1 "How did you feel," would be the question.

01:03:36 2 BY MS. HERNANDEZ:

01:03:36 3 Q. I'm sorry. Strike that question.

01:03:38 4 How did you feel, Mr. Dillon, during the course  
01:03:41 5 of the communications with defendant's counsel?

01:03:43 6 A. It was very casual at first. And there wasn't  
01:03:47 7 any kind of questions in my mind about what was going  
01:03:50 8 on. And then about halfway through is when it just --  
01:03:55 9 it seemed like one-sided questions to where I was --  
01:04:00 10 that just seemed like one-sided questions.

01:04:03 11 Q. What prompted you to contact plaintiff's counsel  
01:04:06 12 after your meeting with them?

01:04:08 13 A. Because it just seemed off, the entire thing.  
01:04:13 14 After I looked at it, like, looked back at it, when I  
01:04:18 15 walked out -- like, I'm not the one to really question  
01:04:22 16 anything, but that was questionable to me.

01:04:24 17 So I just wanted -- and if anything, whenever I  
01:04:28 18 texted you, just out of total transparency, I wanted you  
01:04:32 19 to know I had spoken with them. And I just didn't want  
01:04:35 20 to -- that's it.

01:04:39 21 Q. Did you feel that they fully explained the nature  
01:04:46 22 of this lawsuit or what was going on?

01:04:49 23 A. No.

01:04:49 24 MR. HUNT: Objection. Leading.

01:04:52 25 Q. Prior to asking you these questions.

01:04:54 1 A. No. The only information that I had was that  
01:04:58 2 quick text where they said, "We represent An. And that  
01:05:05 3 was it. I didn't know on which side. No, I did not.

01:05:14 4 MS. HERNANDEZ: Mr. Dillon, thank you very  
01:05:15 5 much. I have no further questions at this time.

01:05:21 6 - - -

01:05:21 7 JUSTIN DILLON, CROSS-EXAMINATION

01:05:21 8 BY MR. HUNT:

01:05:21 9 Q. Mr. Dillon, I'm John Hunt. I represent the  
01:05:25 10 defendants. You're not a plaintiff in this case,  
01:05:27 11 correct?

01:05:27 12 A. Correct.

01:05:28 13 Q. You've never filed a consent to sue; is that  
01:05:30 14 correct?

01:05:30 15 A. Correct.

01:05:31 16 Q. You're not represented by Ms. Hernandez or Mr.  
01:05:35 17 Cohen; is that correct?

01:05:36 18 A. Correct.

01:05:38 19 Q. Is that correct?

01:05:38 20 A. Correct. Yes.

01:05:39 21 Q. In fact, you quit your employment at An in  
01:05:46 22 November 2016; is that right?

01:05:47 23 A. Yes, sir.

01:05:48 24 Q. You don't work at the Umstead?

01:05:50 25 A. No, sir.



01:05:51 1 Q. You don't work for SAS?

01:05:53 2 A. No, sir.

01:05:54 3 Q. In fact, you don't work for any company  
01:05:56 4 affiliated with any of those organizations, correct?

01:05:58 5 A. Not at the moment.

01:06:01 6 Q. You returned a call that you received on March 2,  
01:06:06 7 2018, correct?

01:06:07 8 A. Yes.

01:06:10 9 Q. You voluntarily returned that call?

01:06:13 10 A. Yes. I didn't know who was calling. I do not  
01:06:15 11 set up my voice mail on purpose on my personal phone.  
01:06:19 12 So I had --

01:06:21 13 Q. No one forced you to return that call? You went  
01:06:24 14 ahead and returned it?

01:06:25 15 A. I did not know who was calling, so yes, I -- so  
01:06:29 16 yes, I returned it.

01:06:30 17 Q. You could have ignored the call if you chose to  
01:06:32 18 do so, right?

01:06:33 19 A. Normally people don't ignore phone calls.

01:06:35 20 Q. You could have?

01:06:36 21 A. Yes, I could have ignored it if I wanted to, but  
01:06:39 22 I did not.

01:06:39 23 Q. When you called the number, the person that  
01:06:41 24 answered the phone identified that they were with the  
01:06:44 25 Stokes Wagner law firm; is that right?

01:06:47 1 MS. HERNANDEZ: Objection. Leading.

01:06:50 2 A. They told me --

01:06:51 3 THE COURT: One moment. Let me rule on the  
01:06:53 4 objection.

01:06:54 5 Sustained.

01:06:55 6 MR. HUNT: I'm sorry, Your Honor. I thought  
01:06:57 7 this was a hostile witness.

01:06:59 8 THE COURT: That is true. You can lead.  
01:07:02 9 Why don't you repeat the question.

01:07:05 10 BY MR. HUNT:

01:07:06 11 Q. When you returned the phone call you received,  
01:07:08 12 the person who answered the phone said that it was the  
01:07:11 13 Stokes Wagner law firm, right?

01:07:13 14 A. No, they said that they -- my name is Erin  
01:07:17 15 Whitlock, and I represent An.

01:07:18 16 Q. Did you speak with a woman by the name of Sarah  
01:07:21 17 St. Pierre?

01:07:22 18 A. I think that was the secretary that told me to  
01:07:25 19 wait.

01:07:26 20 Q. And when Ms. St. Pierre answered the phone, she  
01:07:30 21 identified that you had called the Stokes Wagner law  
01:07:34 22 firm, right?

01:07:34 23 A. I do not recall. It was a very quick  
01:07:37 24 interaction. And, I mean, it was my day off. I wasn't  
01:07:41 25 paying that much attention on that.

01:07:43 1 Q. Based on your experience, when you call a  
01:07:45 2 business, the business usually --

01:07:47 3 A. It's my personal phone.

01:07:49 4 Q. I'm sorry, sir. If you could wait.

01:07:51 5 When you call a business generally, it's been  
01:07:53 6 your experience the business identifies the name of the  
01:07:57 7 business when you've reached that number, right?

01:07:59 8 A. Yes, absolutely.

01:08:00 9 Q. And sitting here today, you say you can't recall  
01:08:04 10 whether Ms. St. Pierre told you it was Stokes Wagner law  
01:08:08 11 firm or not, right?

01:08:09 12 A. I'm sure they did, but I didn't know who you were  
01:08:12 13 actually representing and the specifics of --

01:08:15 14 Q. Ms. St. Pierre told you that she had called you  
01:08:20 15 regarding the Tom versus An case, correct?

01:08:26 16 A. Yes.

01:08:26 17 Q. So you knew that she had called in connection  
01:08:28 18 with the lawsuit, right?

01:08:30 19 A. Yes. But I did not know which side.

01:08:32 20 Q. So she told you that our law firm or Stokes  
01:08:37 21 Wagner represented the defendants, represented the  
01:08:39 22 restaurant, right?

01:08:40 23 A. No, she said they represent An. I didn't know  
01:08:43 24 if -- it's very vague to me. I'm not used to court.  
01:08:48 25 I'm not used to lawyers.

01:08:49 1 Q. So Ms. St. Pierre told you during your initial  
01:08:54 2 phone call that she was with a law firm that represented  
01:08:59 3 An; am I correct?

01:09:02 4 A. If you want to break it down to exact words, yes.  
01:09:05 5 Understanding of those words was different.

01:09:10 6 Q. You previously have worked at An, as you told  
01:09:14 7 plaintiff's counsel, correct?

01:09:16 8 A. Yeah.

01:09:16 9 Q. You also knew prior to the time that you called  
01:09:19 10 Ms. St. Pierre that Brandon Kelly and Wai Man Tom had  
01:09:27 11 filed a lawsuit against An, correct?

01:09:30 12 A. Yes.

01:09:30 13 Q. You also knew --

01:09:31 14 A. I knew they were going to file a lawsuit.

01:09:34 15 Q. You also knew that they had tried to encourage  
01:09:38 16 other people to participate in that lawsuit including  
01:09:41 17 yourself, correct?

01:09:42 18 MS. HERNANDEZ: Objection. Form.

01:09:43 19 THE COURT: Overruled.

01:09:45 20 A. Yes.

01:09:47 21 Q. So you had all that knowledge by the time you  
01:09:50 22 talked to Ms. St. Pierre, and Ms. St. Pierre informed  
01:09:54 23 you that she was calling on behalf of An, correct?

01:09:59 24 A. Whenever -- okay, so if -- yes.

01:10:06 25 Q. You spoke to Ms. St. Pierre first, then she

01:10:09 1 transferred you to Ms. Whitlock, correct?

01:10:11 2 A. Yes.

01:10:12 3 Q. You then spoke to Ms. Whitlock, right?

01:10:15 4 A. Yes.

01:10:16 5 Q. Ms. Whitlock also told you that she was calling  
01:10:22 6 you in connection with a lawsuit and it was on behalf of  
01:10:25 7 the restaurant, correct?

01:10:27 8 A. Yes. But it was very unclear to what extent  
01:10:32 9 anything was actually happening or who was represented  
01:10:37 10 by who.

01:10:37 11 Q. Well, you knew that Ms. Whitlock was calling from  
01:10:40 12 a law firm that represented the restaurant in this  
01:10:44 13 particular lawsuit, right?

01:10:46 14 A. If I would have known that you guys represented  
01:10:49 15 An and were going against them, I would not have met,  
01:10:52 16 and I would not have participated in any of this.

01:10:55 17 Q. Sir, that's not the question I asked you.

01:10:57 18 What I asked you was: Did you know at the time  
01:11:00 19 you talked to Ms. Whitlock -- or you knew at the time  
01:11:04 20 that you talked to Ms. Whitlock that she was with a law  
01:11:07 21 firm that was representing the defendants, that is, An,  
01:11:11 22 in the case that had been filed by Mr. Kelly and Mr.  
01:11:15 23 Tom, correct?

01:11:16 24 MS. HERNANDEZ: Objection. Asked and  
01:11:17 25 answered.

01:11:18 1 THE COURT: Overruled.

01:11:20 2 A. It's all on paper. You submitted it. Yes. I  
01:11:26 3 mean.

01:11:26 4 Q. The answer to my question is: Yes, you  
01:11:28 5 understood all that?

01:11:29 6 A. I understood that I was speaking to an attorney  
01:11:32 7 or a paralegal for a law firm. I was not aware of who  
01:11:37 8 was being -- I didn't understand who was being  
01:11:44 9 represented. You can say An, but that could mean  
01:11:48 10 anything to me whenever I'm not familiar with all this  
01:11:51 11 stuff.

01:11:52 12 Q. You worked at An and you understood there was a  
01:11:56 13 lawsuit that had been filed by former servers against  
01:12:00 14 An, correct?

01:12:01 15 A. Yes.

01:12:01 16 Q. So you knew that information at the time you  
01:12:04 17 talked to Ms. Whitlock?

01:12:05 18 A. It had been a year later. I -- there was  
01:12:09 19 vagueness in what I understood was going on.

01:12:13 20 Q. Ms. Whitlock wanted to ask you -- well, there  
01:12:16 21 wasn't anything vague in her telling you we represent  
01:12:19 22 the restaurant, was there? I mean, you understood that  
01:12:22 23 you'd worked at the restaurant, and we were representing  
01:12:26 24 the restaurant; is that correct?

01:12:28 25 A. The simple answer, yes.

01:12:31 1 Q. Ms. Whitlock then proceeded to ask you a number  
01:12:35 2 of questions about the case, correct?

01:12:38 3 A. And you're speaking at Starbucks or on the phone?

01:12:41 4 Q. Well, let's talk about on the telephone. Ms.  
01:12:44 5 Whitlock asked you a number of questions about your  
01:12:47 6 employment with An, correct?

01:12:49 7 A. Yes.

01:12:49 8 Q. And during the course of that conversation Ms.  
01:12:51 9 Whitlock told you that your participation in the  
01:12:55 10 conversation was voluntary; did she not?

01:12:57 11 A. Yes. She caught me on a good day off, and she  
01:13:00 12 said: Meet me on Tuesday at Starbucks. And I had the  
01:13:03 13 day off.

01:13:04 14 Q. Sir, what I asked you was: During the  
01:13:06 15 conversation you had with Ms. Whitlock on the phone, she  
01:13:09 16 told you that your participation in a telephone  
01:13:12 17 conversation was voluntary, correct?

01:13:14 18 A. I don't recall, but sure. I mean, I don't  
01:13:17 19 recall. That was a long -- that was -- I'm a busy  
01:13:21 20 person. I don't remember just random phone calls.

01:13:25 21 Q. You've had an opportunity to review the  
01:13:29 22 transcript of that telephone conversation, correct?

01:13:31 23 A. Yes, I have. And I was not aware I was being  
01:13:34 24 recorded as well.

01:13:35 25 Q. The transcript was a true and accurate copy of

01:13:39 1 the conversation you had with Ms. Whitlock?

01:13:42 2 A. I mean, I assume so. You guys submitted it.

01:13:46 3 MR. HUNT: Your Honor, I'd like to submit a  
01:13:48 4 copy of the transcript as Defendant's Exhibit 1.

01:13:50 5 THE COURT: All right.

01:13:55 6 MR. HUNT: May I approach?

01:14:10 7 THE COURT: You may.

01:14:14 8 (Document is handed to the Court.)

01:14:22 9 THE COURT: You haven't marked this?

01:14:24 10 MR. HUNT: I apologize, Your Honor.

01:14:26 11 THE COURT: We'll get a sticker from the  
01:14:28 12 clerk. Are you going to be examining the witness on  
01:14:33 13 this?

01:14:33 14 MR. HUNT: No, I would just like to move it  
01:14:38 15 into evidence, Your Honor.

01:14:38 16 THE COURT: The clerk will mark it as  
01:14:42 17 Exhibit Number 1. And this is the same complete  
01:14:49 18 transcript that was included in your response?

01:14:52 19 MR. HUNT: Yes, Your Honor. That's correct.

01:14:54 20 THE COURT: Okay. Any other questions?

01:15:01 21 BY MR. HUNT:

01:15:02 22 Q. You also, after you spoke with Ms. Whitlock on  
01:15:04 23 the phone, you had a number of exchanges of text  
01:15:07 24 messages with her, correct?

01:15:09 25 A. After the meeting?



01:15:11 1 Q. No.

01:15:12 2 A. You're talking about whenever we were to meet at  
01:15:14 3 Starbucks?

01:15:15 4 Q. Prior to the meeting.

01:15:16 5 A. Yeah. I had asked her what Starbucks and where.  
01:15:20 6 That was about it.

01:15:24 7 Q. You agreed to meet with her, correct?

01:15:27 8 A. Yes.

01:15:29 9 Q. And she responded to your text messages, and you  
01:15:33 10 responded to her text messages, correct?

01:15:36 11 A. I said: My GPS is going crazy. What Starbucks  
01:15:42 12 are you talking about? I don't get out often.

01:15:46 13 She said: The one under the Marriott on  
01:15:48 14 Fayetteville.

01:15:50 15 So then, yes, I met them.

01:15:52 16 Q. You voluntarily agreed to meet with Ms. Whitlock  
01:15:56 17 and Ms. Fishman at Starbucks, correct?

01:16:00 18 A. Yes.

01:16:02 19 Q. No one forced you to meet with them?

01:16:05 20 A. No.

01:16:06 21 Q. You arrived at the Starbucks in Raleigh around  
01:16:11 22 2:30 in the afternoon on March 19?

01:16:13 23 A. Yes, sir.

01:16:14 24 Q. That's a public place?

01:16:17 25 A. As far as I know, yes, sir.

01:16:19 1 Q. There were other people in the Starbucks?

01:16:21 2 A. There was one other person sitting behind us, but  
01:16:25 3 other than that -- they were sitting at a long table,  
01:16:28 4 and they were the only two females there. They said:  
01:16:31 5 Look for two females; I'm wearing a flowered shirt or  
01:16:35 6 flowered blouse, or something like that.

01:16:37 7 Q. People came and went as you were talking to Ms.  
01:16:39 8 Whitlock and Ms. Ms. Fishman?

01:16:43 9 A. As far as I know people weren't coming or leaving  
01:16:48 10 when I was there.

01:16:49 11 Q. You could have left at any time you wanted during  
01:16:51 12 that conversation with Ms. Whitlock and Ms. Fishman?

01:16:56 13 A. Yes, but I'm not that type of person. I'm not  
01:16:59 14 rude.

01:16:59 15 Q. No one forced you to be there; no one forced you  
01:17:04 16 to communicate with them?

01:17:05 17 A. No, sir.

01:17:07 18 Q. When you arrived at the table, Ms. Fishman  
01:17:09 19 introduced herself, correct?

01:17:10 20 A. Actually, no one introduced themselves except for  
01:17:13 21 when I actually sat down. I found two girls with two  
01:17:15 22 laptops and a printer sitting by themselves and assumed  
01:17:19 23 that that's who I was looking for.

01:17:21 24 Q. So your testimony is you just sat down with these  
01:17:26 25 two people and started talking about your employment at

01:17:29 1 An?

01:17:29 2 A. I made, like, the non-vocal, like, look, nod.

01:17:34 3 And: Justin?

01:17:36 4 So then that's when it started.

01:17:38 5 Q. They just launched into questions about your  
01:17:41 6 employment at An?

01:17:43 7 A. I mean, yeah, they didn't really -- they didn't  
01:17:47 8 give me any paperwork. They didn't give me any kind of  
01:17:51 9 true understanding of what was going on. But, yeah,  
01:17:54 10 they started asking me questions.

01:17:56 11 Q. They asked you about your experiences at An with  
01:17:59 12 respect to the tip pool and what different employees did  
01:18:05 13 during the course of employment, correct?

01:18:07 14 A. Yes.

01:18:08 15 Q. They never asked you to settle the case, correct?

01:18:12 16 A. To what?

01:18:12 17 Q. They never made a settlement proposal to you,  
01:18:15 18 correct?

01:18:16 19 A. No.

01:18:17 20 Q. Did they ask you to settle your claim in any  
01:18:21 21 fashion or any claim you had?

01:18:23 22 A. No. But in all honesty, I would have thought  
01:18:26 23 they were going to at the end of the conversation.

01:18:28 24 Q. So you thought that they might ask you, but they  
01:18:31 25 never did?

01:18:31 1 A. Once I realized the questions and where they were  
01:18:34 2 going, I thought that they were just going to make me  
01:18:37 3 sign something just to -- and pay me off to not say  
01:18:40 4 anything.

01:18:41 5 Q. So you were aware during the course of that  
01:18:43 6 conversation that they represented An, that they  
01:18:46 7 represented the defendants, right?

01:18:47 8 A. At the very end, about halfway through to the  
01:18:49 9 very end is whenever I actually knew. Because I had to  
01:18:52 10 ask them. So I was, like: You guys do not represent  
01:18:55 11 Brandon? Because I still did not -- I was not aware  
01:18:58 12 that even Wai Man was the one that filed the suit. I  
01:19:01 13 thought it was Brandon.

01:19:03 14 Q. So halfway through your conversation with Ms.  
01:19:06 15 Fishman and Ms. Whitlock you fully understood, according  
01:19:12 16 to yourself, that they represented the restaurant?

01:19:15 17 A. Yes. Because after they asked me if the sushi  
01:19:18 18 chefs spoke English, I asked them who did they  
01:19:20 19 represent.

01:19:21 20 They said: We represent the restaurant. Like,  
01:19:25 21 as in, we do not -- like, this is, like, a  
01:19:30 22 lawsuit-lawsuit. Like, we are doing this, and we are  
01:19:33 23 the opposing side.

01:19:35 24 And that's whenever I started getting antsy.

01:19:41 25 Q. You continued to talk with them after you learned

01:19:44 1 that they represented the restaurant, right?

01:19:46 2 A. Well, we had more conversations about Jordan's  
01:19:50 3 ring and everything than we did -- after that, once I  
01:19:53 4 actually brought that up, they started calming down on  
01:19:57 5 the questions and the aggressiveness of the questions.

01:19:59 6 Q. They continued to ask you some questions, though,  
01:20:02 7 about the restaurant, right?

01:20:03 8 A. Yeah.

01:20:04 9 Q. You all didn't just make chitchat the rest of the  
01:20:07 10 time? They actually asked you questions about your  
01:20:10 11 employment at the restaurant, correct?

01:20:12 12 A. It would be more along the lines of we had  
01:20:14 13 conversation, then there was a question here and there  
01:20:17 14 once I started questioning stuff about what they were  
01:20:19 15 saying and their intentions.

01:20:22 16 Q. Ms. Fishman at one point in the conversation  
01:20:25 17 asked you to review a statement or a declaration on her  
01:20:29 18 laptop, right?

01:20:30 19 A. I asked to see it and review it. She did not  
01:20:35 20 willfully offer that to me.

01:20:37 21 Q. She did show it to you though, correct?

01:20:39 22 A. Yeah. She let me revise it. And I took out  
01:20:42 23 about two and a half pages of stuff that was not right  
01:20:47 24 and very misconstrued statements.

01:20:50 25 Q. So you asked to review your statement?

01:20:52 1 A. Yes.

01:20:52 2 Q. She then provided you with access to her laptop?

01:20:55 3 A. Uh-huh.

01:20:57 4 Q. Correct?

01:20:57 5 A. Yes, sir.

01:20:58 6 Q. Then you edited the statement?

01:21:01 7 A. Yes.

01:21:02 8 Q. Then Ms. Whitlock went to the Marriott to obtain

01:21:08 9 a copy of the statement, correct?

01:21:10 10 A. Yes.

01:21:10 11 Q. You then signed the statement, right?

01:21:13 12 A. Yes. Because it was -- she asked: Sign here.

01:21:17 13 So I signed.

01:21:19 14 Q. The statement says that it's executed under

01:21:22 15 penalty of perjury right above your signature, correct?

01:21:25 16 A. It was my day off. I was wanting -- I did not --

01:21:29 17 I was not fully aware -- okay, yeah. If I needed to

01:21:33 18 read more, then I should have read more. But that was

01:21:36 19 not on the actual computer whenever she was showing me

01:21:41 20 the thing. I was only reading the computer. So

01:21:43 21 whenever she brought me what she had printed off, I just

01:21:47 22 signed it. There was just a bunch of bullets and, like,

01:21:54 23 sentences whenever I was revising it. Then whenever she

01:21:59 24 brought the paper to me it actually had the signing --

01:22:01 25 like, the signing, like, line on the bottom.

01:22:06 1 Q. Right above that line it said, "Executed under  
01:22:09 2 penalty of perjury," correct? You saw that?

01:22:13 3 A. Did I read it? No.

01:22:15 4 Q. I thought you told us you read the affidavit  
01:22:18 5 before you signed it.

01:22:20 6 A. I read everything on the computer. When she  
01:22:24 7 brought what was printed off, I just assumed that  
01:22:28 8 whatever was on the computer was what was there.

01:22:33 9 Q. She provided you with an opportunity to review  
01:22:35 10 the affidavit?

01:22:36 11 A. Yes, she did. I did not.

01:22:38 12 Q. She didn't rush you out of there?

01:22:40 13 A. No, I wouldn't say she rushed me out of there.

01:22:45 14 Q. You had time to review it? You had time? As you  
01:22:48 15 said, you made corrections on the computer?

01:22:50 16 A. I made the corrections on the computer. And out  
01:22:53 17 of trust I assumed that everything would have been the  
01:22:55 18 same, so I signed it.

01:23:00 19 MR. HUNT: Your Honor, if I could approach.

01:23:12 20 (Document is handed to the Court.)

01:23:18 21 THE COURT: You've handed up something  
01:23:19 22 that's been marked Exhibit A.

01:23:22 23 MR. HUNT: Just to lessen the confusion of  
01:23:23 24 the numbers, this was Exhibit A to our response to --

01:23:28 25 THE COURT: So this is your Exhibit Number

01:23:30 1 2?

01:23:31 2 MR. HUNT: Correct. This would be Exhibit  
01:23:32 3 Number 2.

01:23:33 4 THE COURT: And you would ask the clerk to  
01:23:34 5 mark it as such?

01:23:35 6 MR. HUNT: Yes, please. Thank you.

01:23:42 7 If I could show that to Mr. Dillon.

01:23:47 8 THE COURT: Do you have an understanding of  
01:23:49 9 how to work our equipment in this courtroom?

01:23:52 10 MR. HUNT: Probably not, Your Honor.

01:23:53 11 THE COURT: So where are you from?

01:23:55 12 MR. HUNT: Atlanta.

01:23:57 13 THE COURT: Who is your local counsel?

01:24:01 14 MS. GIBBONS: Susanna Gibbons, Your Honor.

01:24:07 15 THE COURT: You should be able to work that  
01:24:10 16 equipment.

01:24:11 17 MS. GIBBONS: I'm sorry, Your Honor.

01:24:13 18 THE COURT: Now is the time to start. Walk  
01:24:16 19 over and pull up the -- I've asked the clerk to go over  
01:24:20 20 and help a little bit.

01:26:28 21 BY MR. HUNT:

01:26:28 22 Q. Mr. Dillon, do you see what's been marked as  
01:26:31 23 Defendant's Exhibit Number 2?

01:26:35 24 THE COURT: Let's clear the arrow. Don't  
01:26:43 25 touch the screen. If they ask you to mark it -- this is



01:28:04 1 meant to improve efficiencies, but everybody's got to  
01:28:09 2 know how it works. We'll keep on going.

01:28:13 3 BY MR. HUNT:

01:28:13 4 Q. Mr. Dillon, I'm going to show you what's been  
01:28:16 5 marked Defendant's Exhibit Number 2. Is this a copy of  
01:28:19 6 the declaration that you provided to Ms. Whitlock and  
01:28:24 7 Ms. Fishman at the meeting at the Starbucks in Raleigh?

01:28:29 8 A. Uh-huh.

01:28:30 9 Q. Yes?

01:28:30 10 A. Yes, sir.

01:28:31 11 Q. If you could, on the second page of the  
01:28:37 12 declaration, is that your signature at the bottom?

01:28:40 13 A. Yes, sir.

01:28:41 14 Q. Immediately above that does it say, "I declare  
01:28:43 15 under penalty of perjury under the laws of the State of  
01:28:47 16 North Carolina that the foregoing is true and correct"?

01:28:50 17 A. Yes, sir. But whenever I'm reading it, even now  
01:28:53 18 looking at it it all looks like one big sentence. Under  
01:28:59 19 Title 11.

01:29:03 20 Q. Mr. Dillon, during the conversation that you had  
01:29:06 21 with Ms. Whitlock and Ms. Fishman, did they threaten you  
01:29:10 22 at any time?

01:29:11 23 A. No.

01:29:11 24 Q. Did they yell at you at any time?

01:29:13 25 A. No.

01:29:13 1 Q. Did they raise their voice at any time?

01:29:15 2 A. No.

01:29:16 3 Q. Were you scared of Ms. Fishman?

01:29:18 4 A. No.

01:29:19 5 Q. Were you scared of Ms. Whitlock?

01:29:21 6 A. No.

01:29:23 7 Q. In fact, when you left the meeting, did you  
01:29:29 8 basically make a gesture with your middle finger with  
01:29:32 9 respect to An?

01:29:39 10 A. Probably. So is that on here?

01:29:43 11 Q. You were trying to indicate your contempt for the  
01:29:46 12 defendants, correct?

01:29:47 13 A. No, halfway through the meeting I realized who I  
01:29:50 14 was talking to. I would have never spoken with you  
01:29:52 15 guys; I would have never been part of this.

01:29:54 16 Q. And after you -- and according to your testimony,  
01:29:58 17 after this revelation came to you, you continued to  
01:30:02 18 talk, correct, and participate in the meeting?

01:30:05 19 A. Because I was sitting in front of two women and  
01:30:07 20 was being asked questions does not mean that I wanted to  
01:30:10 21 continue. I thought that I was supposed to continue.

01:30:13 22 Q. You could have left at any time, right?

01:30:15 23 A. Yes.

01:30:16 24 Q. You could have discontinued the conversation?

01:30:19 25 A. But it's called rude.

01:30:21 1 Q. You could have excused yourself politely and  
01:30:24 2 left, right?

01:30:25 3 A. Still had no reason to. I mean, it's not like  
01:30:28 4 someone was calling me and I've got to go answer my  
01:30:30 5 phone.

01:30:31 6 Q. Following the meeting that you had with Ms.  
01:30:33 7 Whitlock and Ms. Fishman, you texted Ms. Whitlock,  
01:30:38 8 correct?

01:30:40 9 A. I texted Ms. Whitlock? No, I called them  
01:30:43 10 immediately whenever I walked out. And then after I  
01:30:46 11 spoke with them, then I texted her.

01:30:48 12 Q. So by "them" you mean plaintiff's counsel, Ms.  
01:30:52 13 Hernandez?

01:30:53 14 A. You're confusing me now, your broad generalities.  
01:30:59 15 You said once I walked out, but then how long? Days?  
01:31:02 16 Weeks? Minutes?

01:31:03 17 Q. Once you left the meeting, that afternoon, did  
01:31:06 18 you call Ms. Hernandez and Mr. Cohen?

01:31:08 19 A. Yes.

01:31:09 20 Q. You knew they represented Mr. Kelly and Mr. Tom,  
01:31:13 21 correct?

01:31:14 22 A. At that point I did.

01:31:16 23 Q. And you'd known that since Mr. Kelly had  
01:31:21 24 contacted you about the case back in 2017?

01:31:24 25 A. All right. So whenever Brandon had sent me that

01:31:27 1 text, there was no name of a law firm attached with a  
01:31:31 2 number. I just knew a number. When I realized that you  
01:31:36 3 guys represented An as going against them, I looked back  
01:31:41 4 through my text and called the number that he had sent  
01:31:44 5 me, and that's who answered. I did not know who I was  
01:31:49 6 calling.

01:31:50 7 Q. So you called a number that Mr. Kelly had sent  
01:31:52 8 you?

01:31:52 9 A. Absolutely.

01:31:54 10 Q. You then in the course of your text messages you  
01:31:58 11 asked Ms. Whitlock for a copy of the declaration you  
01:32:05 12 signed, right?

01:32:06 13 A. Yes. I had to go out of my way to ask her for a  
01:32:09 14 declaration after I had spoken with them because they  
01:32:12 15 made it very clear -- I was not given any information.

01:32:14 16 Q. In fact, she told you at the end of the  
01:32:17 17 conversation that she couldn't give you the declaration  
01:32:19 18 right there without having to go back to the Marriott to  
01:32:22 19 print it off, correct?

01:32:23 20 A. That's not true.

01:32:24 21 Q. So you -- but when you asked her through the text  
01:32:29 22 message for the declaration, she provided it to you?  
01:32:33 23 She emailed it to you?

01:32:35 24 A. She sent it to me over email, but I had to go out  
01:32:38 25 of my way to ask for it.

01:32:39 1 Q. You texted her back after getting it and after  
01:32:42 2 having it in your possession and said you weren't going  
01:32:45 3 to make any changes to it, right?

01:32:46 4 A. Yes. Because I had felt -- I just wanted to  
01:32:49 5 relook over what I had said. And I'm still comfortable  
01:32:53 6 with everything that's on here.

01:32:55 7 Q. So there's nothing in the declaration that you  
01:32:57 8 disagree with?

01:32:59 9 A. I mean, maybe the fact that I just quickly  
01:33:03 10 overlooked, "I declare under the penalty." That's about  
01:33:07 11 the only thing. I went and looked through it. I feel  
01:33:10 12 confident with what I had to edit and make and what I  
01:33:14 13 signed. Yes.

01:33:16 14 Q. Did Ms. Fishman or Ms. Whitlock at any time ever  
01:33:19 15 ask you to do anything other than tell them about the  
01:33:24 16 facts concerning your employment at An?

01:33:27 17 A. No.

01:33:29 18 MR. HUNT: Thank you. I don't have anything  
01:33:30 19 further -- one more. I'm sorry, one more thing, Your  
01:33:34 20 Honor.

01:33:34 21 Your Honor I would like to move Exhibits 1  
01:33:36 22 and 2 into evidence.

01:33:37 23 THE COURT: All right. Let them be  
01:33:39 24 received.

05:25:52 25 (Whereupon Defendant's Exhibits 1 and 2 are

05:25:54 1 admitted into evidence.)

01:33:43 2 - - -

01:33:43 3 JUSTIN DILLON, REDIRECT EXAMINATION

01:33:44 4 BY MS. HERNANDEZ:

01:33:44 5 Q. Mr. Dillon, I just have a couple questions.

01:33:46 6 Going back to Defendant's Exhibit A, which is a

01:33:48 7 transcription of the discussion that you had with Ms.

01:33:51 8 Whitlock, if you -- do you have a copy of Defendant's

01:33:55 9 Exhibit A in front of you?

01:33:57 10 A. I do not.

01:34:01 11 THE COURT: Okay. We're going to call it 1

01:34:03 12 or 2. So you're referring to, I believe, 2, which is

01:34:07 13 the transcript.

01:34:08 14 MS. HERNANDEZ: It's Exhibit 1, Your Honor.

01:34:09 15 THE COURT: Exhibit 1. And that was the --

01:34:13 16 what was that?

01:34:14 17 MS. HERNANDEZ: This was the transcription

01:34:16 18 of the recording of the recorded discussion between

01:34:21 19 defendant's paralegal -- defendant's counsel's

01:34:25 20 paralegal, Ms. Erin Whitlock, and Justin Dillon.

01:34:29 21 THE COURT: So we don't have that in

01:34:31 22 evidence?

01:34:34 23 MR. HUNT: Yes, Your Honor. I think that

01:34:35 24 was Exhibit 1, the transcript.

01:34:37 25 THE COURT: I thought you were talking about

01:34:39 1 transcript of a telephone -- yes, this is the phone  
01:34:42 2 recording. Okay.

01:34:45 3 MS. HERNANDEZ: I just thought that Mr.  
01:34:46 4 Hunt, defendant's counsel, had handed up the copy.

01:34:51 5 THE COURT: Well, you can pull up your  
01:34:52 6 camera and turn it on and open it up to any page, and it  
01:34:56 7 will show on the witness's screen.

01:35:05 8 THE WITNESS: I would like to hear that  
01:35:07 9 recording.

01:35:07 10 THE COURT: You'll have to switch the camera  
01:35:09 11 over. And both of you need a lesson in this. Would the  
01:35:14 12 clerk go over. And she's going to get some additional  
01:35:19 13 information to you.

01:35:20 14 MS. HERNANDEZ: I can assure you, Your  
01:35:22 15 Honor, after this hearing we will do everything we can  
01:35:24 16 to make sure we're trained.

01:35:29 17 THE COURT: We'll get you both some  
01:35:31 18 training.

01:35:34 19 MS. HERNANDEZ: I think Mr. Cohen's already  
01:35:38 20 figured it out.

01:35:47 21 THE COURT: So what page are you on?

01:35:49 22 MS. HERNANDEZ: Your Honor, I am on page 9  
01:35:51 23 of the transcription.

01:35:52 24 THE COURT: All right.

01:35:57 25 BY MS. HERNANDEZ:

01:35:57 1 Q. Mr. Dillon, you see page 9 of the recorded  
01:36:00 2 conversation that you had with defendant's counsel's  
01:36:03 3 paralegal, Ms. Erin Whitlock?

01:36:06 4 A. Yes.

01:36:06 5 Q. And just so that the Court and counsel here for  
01:36:12 6 the parties are clear, do you understand that this was a  
01:36:17 7 recording of the discussion that you had with Ms.  
01:36:20 8 Whitlock?

01:36:21 9 A. I am, once again, trusting that this is exactly  
01:36:27 10 to word-for-word for what was said. Yes. I don't know  
01:36:30 11 how that works whenever you have to write it down.

01:36:32 12 Q. And just for the record, Mr. Dillon, were you  
01:36:36 13 advised that your discussion with Ms. Whitlock would be  
01:36:38 14 recorded?

01:36:39 15 A. No, I was not.

01:36:40 16 Q. So turning to page 9 here, line 12, it says  
01:36:51 17 here -- you say, "I mean, definitely -- and for the  
01:36:54 18 restaurant, we had people from back of the house  
01:36:57 19 stepping on front of the house soil and we were tipping  
01:36:59 20 out back of the house, which is also illegal."

01:37:01 21 Do you see that, Mr. Dillon?

01:37:03 22 A. Yes.

01:37:04 23 Q. And then line 17 Ms. Whitlock asks you, "What do  
01:37:09 24 you mean by stepping on front of the house soil?"

01:37:13 25 And then going to line 19, it says here, "So



01:37:18 1 whatever ... back of the house ... legally if you are a  
01:37:23 2 kitchen position, you are not allowed to be tipped out  
01:37:25 3 by front of the house. If you are back of the house,  
01:37:27 4 you're not allowed out of the kitchen, you are supposed  
01:37:34 5 to stay there and cook or do your job and they  
01:37:34 6 definitely" -- going to page 10, "I was tipping out  
01:37:36 7 somebody that never set foot on front of the house."

01:37:39 8 Did I read that correctly, Mr. Dillon?

01:37:41 9 A. Yes, ma'am.

01:37:42 10 Q. Then Ms. Whitlock said, "Okay. So you were  
01:37:50 11 tipping out somebody that was back of the house."

01:37:52 12 Did I read that correctly?

01:37:53 13 A. Yes.

01:37:53 14 Q. Then line 5 you said, "A back of the house  
01:37:55 15 person, yeah. He was expo, or expediter."

01:37:57 16 A. Yes.

01:37:58 17 Q. Did I read that correctly?

01:37:59 18 A. Yes, ma'am.

01:38:00 19 Q. And then line 8, it says there, "But he never  
01:38:03 20 once stepped foot on the front of the house soil and  
01:38:06 21 that -- I know that for a fact as management, I know  
01:38:10 22 that's illegal."

01:38:11 23 Did I read that correctly?

01:38:12 24 A. Yes, ma'am.

01:38:12 25 Q. What did you mean when you made those statements,

01:38:16 1 Mr. Dillon?

01:38:17 2 A. I know that legally -- oh, the position that he  
01:38:22 3 was hired for does not require a front of the house tip  
01:38:28 4 out, period. Any restaurant I've ever worked at in my  
01:38:34 5 entire life, even when I got into management, that was  
01:38:37 6 something that had always been instilled to me. You  
01:38:40 7 don't tip out a chef; you don't tip out expeditors.  
01:38:44 8 It's a back of the house position. That's an hourly  
01:38:46 9 position. That's not tipped.

01:38:47 10 Q. So, Mr. Dillon, if I understood you correctly,  
01:38:50 11 are you suggesting that an expo, his position is back of  
01:38:53 12 the house and not front of the house?

01:38:55 13 A. Expediter is a back of the house position. It is  
01:38:58 14 paid by back of the house hourly.

01:39:02 15 Q. So a back of the house expo position is not  
01:39:05 16 engaging in client interaction; is that correct?

01:39:07 17 MR. HUNT: Objection. This is beyond the  
01:39:09 18 scope of the hearing, Your Honor. I think she's  
01:39:11 19 getting --

01:39:11 20 THE COURT: How does this fit in?

01:39:13 21 MS. HERNANDEZ: Your Honor, the only reason  
01:39:15 22 I'm bringing this up is there are some discrepancies  
01:39:17 23 here from what he testified to in this recorded  
01:39:20 24 discussion versus what's in the declaration, another  
01:39:23 25 suggestion that the information was not entirely clear

01:39:28 1 to Mr. Dillon in terms of the nature of the declaration  
01:39:31 2 he was signing and the purpose of the evidence being  
01:39:35 3 gathered and what it was going to be used for.

01:39:38 4 THE COURT: Okay. Well, let's try to move  
01:39:42 5 it along.

01:39:44 6 BY MS. HERNANDEZ:

01:39:47 7 Q. And now turning to Defendant's Exhibit Number 2,  
01:39:51 8 Mr. Dillon.

01:40:17 9 So, Mr. Dillon, turning to Defendant's Exhibit  
01:40:19 10 Number 2, this is the declaration that you signed for  
01:40:24 11 defendant's counsel, correct?

01:40:25 12 A. Yes, ma'am.

01:40:26 13 Q. And as you sit here today, Mr. Dillon, is it  
01:40:32 14 appropriate to say that there is no case caption,  
01:40:35 15 there's nothing here to suggest that -- what the case --  
01:40:37 16 the nature of the case is or anything like that; is that  
01:40:40 17 correct?

01:40:40 18 MR. HUNT: Objection. Leading.

01:40:43 19 THE COURT: Well, I mean, I can see it.

01:40:49 20 BY MS. HERNANDEZ:

01:40:49 21 Q. Mr. Dillon, if you turn to paragraph 7 it says  
01:40:53 22 here in Defendant's Exhibit Number 2, "Nick would come  
01:40:57 23 to the front of the house while working as an expo."  
01:41:02 24 Would you agree that that information is somewhat  
01:41:05 25 inconsistent with the recorded discussion you had with

01:41:08 1 Erin Whitlock?

01:41:09 2 A. Yes.

01:41:10 3 MR. HUNT: Objection. Objection, leading.

01:41:12 4 I'd also like to ask him about his testimony on page --

01:41:17 5 excuse me.

01:41:18 6 THE COURT: You will get a chance to do a

01:41:21 7 recross.

01:41:24 8 MR. HUNT: Thank you.

01:41:24 9 THE COURT: And it is leading, and that

01:41:26 10 objection is sustained.

01:41:29 11 BY MS. HERNANDEZ:

01:41:30 12 Q. In reading paragraph number 7, Mr. Dillon, could

01:41:33 13 you please read that out loud?

01:41:35 14 A. "Nick would come to the front of the house while

01:41:37 15 working as an expo. Expo was responsible for making

01:41:40 16 sure food got to the right table. Nick did it on his

01:41:43 17 own accord instead of yelling for runners. He wanted

01:41:46 18 the food to go out on time, when it needed to go out and

01:41:50 19 he would carry the food to the table. But his position

01:41:52 20 was back of the house."

01:41:54 21 Q. And could you just simply clarify what you mean

01:41:58 22 by this paragraph, Mr. Dillon?

01:42:00 23 A. All right. So as I explained it to you, if I'm a

01:42:04 24 server, and I see that I need a steak cooked, and it's

01:42:07 25 taking too long, if I go step behind the kitchen and

01:42:10 1 cook a steak, it's not my responsibility or my job. He  
01:42:15 2 takes it upon himself to go do that because he just  
01:42:17 3 wants to go see people. It was not his job.

01:42:21 4 Q. And, Mr. Dillon, as you sit here today, do you  
01:42:24 5 recall why defendant's counsel were asking you questions  
01:42:28 6 about the nature of Nick Pappas's position at An?

01:42:35 7 A. To tell you the truth, I thought that Brandon and  
01:42:39 8 Wai were suing over back pay. I didn't even know that  
01:42:44 9 Nick Pappas was even a part of it when they were asking  
01:42:48 10 these questions. That's when I started getting the  
01:42:50 11 weird feeling.

01:42:51 12 MS. HERNANDEZ: Thank you very much, Mr.  
01:42:52 13 Dillon. I have no further questions.

01:42:52 14 - - -

01:42:52 15 JUSTIN DILLON, RECROSS-EXAMINATION

01:42:55 16 BY MR. HUNT:

01:42:55 17 Q. Mr. Dillon, I'd like to ask you a few questions  
01:42:59 18 in light of counsel's questions.

01:43:02 19 Exhibit 1, if you could turn to page 11.

01:43:05 20 A. I can't turn the page.

01:43:07 21 MR. HUNT: I'm sorry.

01:43:09 22 THE COURT: We're not that technically savvy  
01:43:12 23 yet.

01:43:24 24 BY MR. HUNT:

01:43:24 25 Q. If I could direct your attention, this is page 11

01:43:28 1 of the transcript of the telephone call. And at number  
01:43:36 2 12 -- or, excuse me, line 12, Ms. Whitlock says, "The  
01:43:44 3 right food to the right table. What do you mean like  
01:43:47 4 by... like how do they do that?"

01:43:49 5 You said, "So they ... the kitchen puts food in  
01:43:52 6 a -- on a shelf."

01:43:54 7 She said, "Uh-huh."

01:43:55 8 You replied, "And then the expo takes the food,  
01:43:57 9 makes sure it's to the right table."

01:44:00 10 So do they take it to the table?

01:44:02 11 A. The right food to the table means that you call  
01:44:05 12 for hands and you tell them: Table 3, position 1. You  
01:44:08 13 don't take the food. That is -- this is -- you need to  
01:44:13 14 work in restaurants to understand what I'm saying.

01:44:15 15 Q. Then let me ask you about page 12 where Ms.  
01:44:27 16 Whitlock said, "But are they taking it to the table?"

01:44:29 17 And you said, "No. They will -- they will take  
01:44:33 18 it to the table, and then that's why they felt obligated  
01:44:37 19 that we tip them out."

01:44:39 20 A. It's not their job. And because someone demands  
01:44:42 21 money does not mean that that is the rule for the  
01:44:45 22 restaurant.

01:44:46 23 Q. Sir, I understand that that's your opinion.

01:44:49 24 But --

01:44:50 25 A. That's one sentence. You're misconstruing it.

01:44:53 1 Q. You told --

01:44:53 2 THE COURT: One second. Did you have  
01:44:56 3 another answer?

01:44:56 4 THE WITNESS: Yes.

01:44:57 5 A. You're misconstruing that. I did not mean it  
01:44:59 6 like that. That is how it was written out, or that's  
01:45:01 7 how it sounds, but that is not what I meant.

01:45:04 8 Q. You told Ms. Whitlock that on occasion Mr.  
01:45:09 9 Pappas, the expediter, would take food to the table; is  
01:45:13 10 that correct?

01:45:13 11 A. He would take it upon himself. Just as I said,  
01:45:16 12 if your neighbor's grass needed cut, if you want to go  
01:45:19 13 cut it, are you going to ask him for money?

01:45:23 14 Q. So Mr. Pappas would take food on occasion to the  
01:45:27 15 table, correct?

01:45:28 16 A. On his own accord, not his job.

01:45:31 17 Q. You weren't in management at An, correct?

01:45:34 18 A. No, I was not.

01:45:35 19 Q. You weren't -- you didn't supervise Mr. Pappas,  
01:45:38 20 correct?

01:45:39 21 A. No.

01:45:40 22 MR. HUNT: Thank you. Nothing further, Your  
01:45:44 23 Honor.

01:45:44 24 THE COURT: All right. Are we finished with  
01:45:46 25 this witness?

01:45:47 1 MS. HERNANDEZ: I am, Your Honor. Thank  
01:45:48 2 you.

01:45:48 3 THE COURT: Thank you. You can step down.  
01:45:51 4 Do you have another witness?

01:45:53 5 MS. HERNANDEZ: No, Your Honor.

01:45:54 6 THE COURT: Any other evidence?

01:45:55 7 MS. HERNANDEZ: No other evidence, Your  
01:45:57 8 Honor.

01:45:57 9 THE COURT: Okay. Well, let's turn our  
01:45:59 10 attention to the defendant.

01:46:00 11 Do you have a witness?

01:46:01 12 MR. HUNT: Well, Your Honor, I would like to  
01:46:04 13 have Ms. Whitlock --

01:46:05 14 THE COURT: And this witness is excused. I  
01:46:07 15 don't know if he came by subpoena.

01:46:11 16 THE WITNESS: No, I didn't come by subpoena.  
01:46:14 17 Can I shake hands with everybody?

01:46:17 18 THE COURT: Certainly.

01:46:22 19 MR. HUNT: I would like to have Ms. Whitlock  
01:46:25 20 testify, and perhaps briefly Ms. Fishman, if that is  
01:46:29 21 okay.

01:46:29 22 THE COURT: All right. And thank you for  
01:46:38 23 sequestering her.

01:47:02 24 THE CLERK: Please come forward and stand in  
01:47:04 25 front of the clerk's bench. Place your left hand on the



01:47:09 1 Bible and raise your right hand.

01:47:10 2 State your name for the Court.

01:47:12 3 THE WITNESS: Erin Whitlock.

01:47:13 4 THE COURT: Spell your name for the Court.

01:47:14 5 E-r-i-n W-h-i-t-l-o-c-k.

01:47:19 6 THE CLERK: Thank you.

01:47:20 7 (Whereupon the witness was sworn by the

01:47:27 8 clerk.)

01:47:27 9 THE CLERK: Please take the witness stand

01:47:29 10 and be seated.

01:47:31 11 - - -

01:47:31 12 ERIN WHITLOCK, DIRECT EXAMINATION

01:47:31 13 BY MR. HUNT:

01:47:31 14 Q. Ms. Whitlock, where do you work?

01:47:41 15 A. I'm sorry. What?

01:47:42 16 Q. Where do you work? For whom do you work?

01:47:44 17 A. Stokes Wagner in Atlanta.

01:47:46 18 Q. What is Stokes Wagner?

01:47:47 19 A. I'm a paralegal.

01:47:48 20 Q. Stokes Wagner is a law firm that represents --

01:47:52 21 A. Yes, it's a law firm in Atlanta, Georgia. We

01:47:56 22 have offices all over, but...

01:48:00 23 Q. You have worked in connection with the lawsuit

01:48:05 24 that's been filed against An Restaurant and other

01:48:10 25 defendants here in court, correct?

01:48:11 1 A. Correct.

01:48:12 2 Q. During the course of that work have you ever had  
01:48:15 3 any contact with Mr. Justin Dillon?

01:48:18 4 A. Yes, I have.

01:48:19 5 Q. When was the first occasion that you had contact  
01:48:22 6 with him?

01:48:22 7 A. I believe it was early March. I don't recall the  
01:48:28 8 exact date. But a colleague of mine, Ms. Sarah St.  
01:48:34 9 Pierre, transferred a call to me from him.

01:48:43 10 Q. How did that conversation begin?

01:48:45 11 A. Ms. St. Pierre said that she was -- wanted to  
01:48:50 12 make sure that I confirmed his understanding of things.  
01:48:54 13 She -- as we had worked together to contact people, she  
01:48:58 14 would go, kind of, over a script with them. And she  
01:49:03 15 just wanted to make sure he understood the points to  
01:49:08 16 that. And so when I began to speak with him, I  
01:49:11 17 confirmed that he understood who we represented and that  
01:49:14 18 it was voluntary, I think were the first two things I  
01:49:17 19 said.

01:49:17 20 Q. That what was voluntary?

01:49:18 21 A. That he -- I said he could stop talking at any  
01:49:22 22 point in time.

01:49:23 23 Q. Did you record the conversation?

01:49:26 24 A. Yes.

01:49:27 25 Q. Was a recording of that transcribed?

01:49:32 1 A. Yes.

01:49:33 2 Q. Have you had an opportunity to review that  
01:49:34 3 transcription?

01:49:35 4 A. Yes, I have.

01:49:37 5 Q. Was that a true and accurate transcription of  
01:49:39 6 your conversation with Mr. Dillon?

01:49:40 7 A. Yes.

01:49:45 8 Q. During your conversation -- and I don't want you  
01:49:51 9 to repeat it line for line, but what kinds of questions  
01:49:55 10 did you ask him?

01:49:57 11 A. Just questions about his employment and what he  
01:50:02 12 remembered from working at the restaurant.

01:50:08 13 Q. Did he express any reluctance to you to answer  
01:50:11 14 those questions?

01:50:12 15 A. No. There was only one question that he said he  
01:50:15 16 didn't want to answer, and that was -- had something to  
01:50:19 17 do with his prior employment.

01:50:22 18 Q. During any time -- or at any time during that  
01:50:26 19 conversation did the subject of settlement or resolving  
01:50:30 20 any claim Mr. Dillon might have come up?

01:50:34 21 A. No.

01:50:35 22 Q. Did you ask him to consider settling any claim he  
01:50:41 23 might have in any way?

01:50:42 24 A. No.

01:50:42 25 Q. At that time had Mr. Dillon filed a consent to

01:50:50 1 sue?

01:50:50 2 A. No.

01:50:53 3 Q. Did you ask him not to file a consent to sue?

01:50:56 4 A. No.

01:50:58 5 Q. Did you tell him not to participate in the case  
01:51:02 6 in any fashion?

01:51:03 7 A. No.

01:51:06 8 Q. About how long was your conversation with Mr.  
01:51:09 9 Dillon?

01:51:09 10 A. I think it was around 15 minutes, 15 or 16  
01:51:14 11 minutes. I'm not sure.

01:51:16 12 Q. Was there anything other than the nature of his  
01:51:22 13 employment at An that the two of you discussed?

01:51:26 14 A. No. We -- I mean, I went through just asking him  
01:51:32 15 questions about how he felt about things at An. Then I  
01:51:36 16 said that there may be somebody else at our office that  
01:51:39 17 may want to speak with him. And I asked him if he was  
01:51:42 18 willing to give a statement.

01:51:45 19 Q. Following the conversation, what, if any, was  
01:51:48 20 your next contact with Mr. Dillon?

01:51:51 21 A. I sent him a text message asking if he would be  
01:51:58 22 willing to meet.

01:52:01 23 Q. Over the course of the next couple of weeks did  
01:52:07 24 you send other text messages to Mr. Dillon?

01:52:10 25 A. Yes.

01:52:12 1 Q. Did Mr. Dillon respond to those text messages?

01:52:15 2 A. Yes.

01:52:15 3 Q. Have you had an occasion to review those text  
01:52:18 4 messages?

01:52:19 5 A. Yes.

01:52:20 6 Q. Have you had an occasion to make copies of those  
01:52:23 7 text messages?

01:52:24 8 A. To make copies of the text messages?

01:52:27 9 Q. The text messages would appear on your cell  
01:52:31 10 phone, correct?

01:52:32 11 A. Yes.

01:52:33 12 MS. HERNANDEZ: Objection. Leading.

01:52:34 13 THE COURT: Well, it's helpful. She's  
01:52:37 14 confused. All right.

01:52:42 15 BY MR. HUNT:

01:52:42 16 Q. From the text messages that were on your cell  
01:52:44 17 phone, what did you do with them?

01:52:47 18 A. I took, like, a screen shot of them so that  
01:52:52 19 everybody else could view them.

01:52:57 20 Q. You took screen shots of the text messages from  
01:53:03 21 your phone?

01:53:03 22 A. Yeah, between me and Justin Dillon.

01:53:06 23 Q. Then what did you do with the screen shots?

01:53:10 24 A. I sent them to our team so that they could see.

01:53:16 25 Q. Did you ever have any occasion to print out those

01:53:19 1 screen shots?

01:53:20 2 A. Yeah, I think I actually printed them out right  
01:53:23 3 when I took the screen shots.

01:53:25 4 MR. HUNT: Your Honor, if I could approach.  
01:53:27 5 I like to show her an exhibit.

01:53:51 6 THE COURT: Did you want to show them to the  
01:53:53 7 witness?

01:53:53 8 MR. HUNT: Yes, Your Honor.

01:53:56 9 THE COURT: Did you give her a copy? Don't  
01:54:00 10 you want to show them to the witness and ask her to  
01:54:03 11 identify?

01:54:03 12 MR. HUNT: Yes, I do.

01:54:09 13 THE COURT: Is that your only copy?

01:54:10 14 MR. HUNT: We have one more.

01:54:16 15 THE COURT: These aren't in evidence yet.

01:54:16 16 (Document is given to the witness by the  
01:54:27 17 Court.)

01:54:27 18 THE COURT: You can just look through it,  
01:54:28 19 then he's going to ask you a couple questions about  
01:54:31 20 whether that's an accurate representation.

01:54:38 21 THE WITNESS: Okay.

01:54:40 22 BY MR. HUNT:

01:54:40 23 Q. Ms. Whitlock, you have seen these documents  
01:54:43 24 before?

01:54:43 25 A. Yes.

01:54:44 1 Q. What are these?

01:54:45 2 A. The screen shots that I took from my phone.

01:54:47 3 Q. Screen shots of what?

01:54:48 4 A. Of text messages between Justin Dillon and  
01:54:51 5 myself.

01:54:51 6 Q. Are these true and accurate copies of the text  
01:54:55 7 messages that you exchanged with him --

01:54:58 8 A. Yes.

01:54:58 9 Q. -- during -- let me finish.

01:55:00 10 Are these true and accurate copies of the text  
01:55:03 11 messages that you exchanged with him during March of  
01:55:06 12 2018?

01:55:07 13 A. Yes.

01:55:11 14 MR. HUNT: Your Honor, I'd like to move the  
01:55:13 15 admission of Defendant's Exhibit Number 3.

01:55:15 16 THE COURT: Any objection?

01:55:16 17 MS. HERNANDEZ: No, Your Honor.

01:55:17 18 THE COURT: Let it be received.

05:25:52 19 (Whereupon Defendant's Exhibit 3 is admitted  
05:25:56 20 into evidence.)

01:55:22 21 BY MR. HUNT:

01:55:23 22 Q. In the course of the text messages did you and  
01:55:26 23 Mr. Dillon discuss meeting?

01:55:34 24 A. Meeting, yes, we did.

01:55:36 25 Q. What did the two of you discuss?

01:55:38 1 A. I asked if he had time to meet for, you know,  
01:55:42 2 coffee.

01:55:43 3 And he said that that was fine; and said:  
01:55:45 4 Downtown?

01:55:45 5 And I suggested a Starbucks and gave him an  
01:55:50 6 address of a Starbucks that I looked up and was located  
01:55:55 7 downtown.

01:55:55 8 Q. What day did you agree to meet?

01:55:57 9 A. I believe it was -- I said Monday, but I think  
01:56:02 10 that that was the 19th. I'm not sure. I'd have to look  
01:56:07 11 at a calendar.

01:56:09 12 Q. You believe it was March 19, 2018?

01:56:11 13 A. Yes.

01:56:13 14 Q. Did you meet with Mr. Dillon at the Starbucks?

01:56:16 15 A. I did.

01:56:18 16 Q. Who arrived first?

01:56:20 17 A. I arrived and Jordan Arkin Fishman, who is an  
01:56:27 18 attorney from our firm; we arrived first.

01:56:33 19 Q. How long were you there before Mr. Dillon  
01:56:35 20 arrived?

01:56:36 21 A. I think it was only a few minutes. I had texted  
01:56:42 22 Mr. Dillon and let him know what I was wearing and my  
01:56:46 23 hair color so that he could recognize me when he got  
01:56:49 24 there. But I think it was only a few minutes.

01:56:54 25 Q. How did the conversation with -- or how did you



01:56:58 1 recognize Mr. Dillon?

01:56:59 2 A. He said -- I think the term he used was Gamecock  
01:57:06 3 or something. But he had a sweatshirt on that had -- I  
01:57:11 4 think it was a Gamecock logo or something like that.  
01:57:15 5 But he looked kind of hesitant, and he walked up to us.  
01:57:19 6 I said: Oh, hey Justin, I'm Erin.

01:57:22 7 Q. What occurred next?

01:57:23 8 A. Jordan, she had never talked to him before, so  
01:57:28 9 she introduced herself. And then we sat down and  
01:57:32 10 thanked him for coming and started talking to him about,  
01:57:39 11 like -- Jordan went over a brief statement of this is  
01:57:42 12 what the case is about and who we represented. Then we  
01:57:47 13 said: We're going to ask you some questions. And  
01:57:49 14 Jordan said, you know, I understand you previously  
01:57:52 15 talked to Ms. Whitlock.

01:57:55 16 Q. When you say that Jordan, Ms. Fishman, introduced  
01:57:59 17 herself, what did she say during that introduction?

01:58:01 18 A. I don't remember, like, the exact words; but I  
01:58:05 19 think she just said: I'm Jordan Fishman from Stokes  
01:58:10 20 Wagner.

01:58:10 21 Q. Did she say she was talking to him about the  
01:58:13 22 case?

01:58:13 23 A. Yes.

01:58:15 24 Q. Did she say who she or you represented?

01:58:20 25 A. I believe she did. Yeah. I mean, we said -- I

01:58:24 1 just -- yeah. She said -- she said we represented -- I  
01:58:28 2 don't think she used the exact names of the defendants  
01:58:32 3 was the thing. She was, like, we represent An, SAS  
01:58:40 4 maybe. I don't recall the exact statement that she  
01:58:43 5 said, but she did say who we represented.

01:58:45 6 Q. There was a statement at the beginning of the  
01:58:47 7 conversation, though, where she indicated who the two of  
01:58:50 8 you were there -- or on whose behalf you were there for?

01:58:53 9 A. Yeah.

01:58:54 10 Q. What occurred during the conversation?

01:58:56 11 A. We just talked to him about his work at An, what  
01:59:02 12 his position was, what he did prior, you know. He made  
01:59:08 13 it very clear that he did not think that the tip pool  
01:59:14 14 was -- or he said any tip pools are illegal -- are  
01:59:24 15 illegal. He talked about the other people working  
01:59:27 16 there. He talked about his work around town. At that  
01:59:34 17 point actually he did disclose where -- his prior  
01:59:37 18 employment. He -- I think that's all I really remember.

01:59:45 19 Q. At the end of the conversation did you ask him to  
01:59:50 20 sign anything?

01:59:54 21 A. Yes.

01:59:54 22 Q. What was that?

01:59:55 23 A. So I was -- I was typing notes on my computer,  
01:59:59 24 and Jordan was typing the actual declaration as he was  
02:00:07 25 talking. And so she said, you know, as we've been

02:00:13 1 talking we've been typing up a declaration of what  
02:00:17 2 you've been saying. And she handed him the computer and  
02:00:23 3 said that he could make any edits that he wanted. Then  
02:00:26 4 he went over some edits that he had, and we made them.  
02:00:29 5 I don't think that -- he might have made a few himself,  
02:00:34 6 but I don't remember clearly. But he did have her  
02:00:37 7 computer. And then my printer wouldn't work. And so I  
02:00:43 8 walked next door to the Marriott to print it out and  
02:00:46 9 came back over, and he signed it. We read over it  
02:00:51 10 again, I think, because Jordan made sure that he had  
02:00:54 11 read over it once again just to make sure it was the  
02:00:57 12 final copy.

02:00:58 13 Q. Did he ask you to add anything to the  
02:01:02 14 declaration?

02:01:03 15 A. Yeah. I know that one thing that he asked us to  
02:01:10 16 add was he was just talking about Brandon Kelly at one  
02:01:14 17 point, I don't remember at what exact point it is, but  
02:01:18 18 he asked us to add Wai Man Tom because he didn't want it  
02:01:23 19 to only be -- you know, to Brandon, or I don't know his  
02:01:27 20 exact words.

02:01:29 21 Q. Did you make that change?

02:01:30 22 A. Yeah. Yes.

02:01:32 23 Q. Did the number of changes that he made to the  
02:01:41 24 document, how extensive were those?

02:01:46 25 A. They weren't very extensive. Well, and the

02:01:50 1 changes that were made, it was like, you know, a  
02:01:53 2 spelling error or adding that person's name or -- I  
02:02:00 3 don't -- I think that's it. I don't know that any,  
02:02:03 4 like, large substantive changes that were made to the  
02:02:06 5 document.

02:02:07 6 Q. After the meeting at the Starbucks, did you have  
02:02:11 7 any other communication with Mr. Dillon?

02:02:16 8 A. He sent me a text message; I believe it was on  
02:02:22 9 the 21st. And he, you know, stated that he had  
02:02:31 10 contacted plaintiff's counsel and stated that he wanted  
02:02:37 11 to edit his statement. And I confirmed that he was not  
02:02:46 12 represented by counsel at that time. And I emailed  
02:02:53 13 him -- I got his email, and I emailed him the statement.  
02:02:57 14 And he said he did not have any changes.

02:03:01 15 Q. I just direct your attention to Exhibit 3. If  
02:03:05 16 you could look at the last page of the document, the  
02:03:14 17 text message that says, "No edits, just been reeling it  
02:03:20 18 over and my head and just wanted hard copy, thank you."

02:03:26 19 Is that your message, or is that Mr. Dillon's  
02:03:29 20 message?

02:03:29 21 A. That's Mr. Dillon's message.

02:03:32 22 Q. It says, "Okay! Thank you!" That is also your  
02:03:37 23 message?

02:03:37 24 A. "Okay! Thank you!" is from me.

02:03:39 25 Q. So in this exhibit the text messages that are in

02:03:43 1 blue are the ones that you sent, and the ones that are  
02:03:46 2 in gray are the ones that Mr. Dillon sent?

02:03:48 3 A. Correct.

02:03:54 4 Q. After the conversation -- or, excuse me, after  
02:03:57 5 the exchange of text messages with Mr. Dillon, after the  
02:04:01 6 meeting at Starbucks, did you have any further contact  
02:04:05 7 with him?

02:04:06 8 A. No.

02:04:13 9 Q. At any time during the course of your  
02:04:15 10 conversations did you ever attempt to ask Mr. Dillon or  
02:04:21 11 encourage Mr. Dillon not to participate in the lawsuit  
02:04:25 12 that's been brought against An?

02:04:28 13 A. No.

02:04:48 14 Q. During the course of your conversations with Mr.  
02:04:51 15 Dillon did you ever say anything that was negative or  
02:04:56 16 critical of Ms. Hernandez or Mr. Cohen or their law firm  
02:05:01 17 or plaintiff's counsel?

02:05:02 18 A. No.

02:05:03 19 Q. During the course of your conversations did you  
02:05:06 20 discuss Ms. Hernandez or Mr. Cohen in any fashion?

02:05:11 21 A. No, I don't think so. No.

02:05:14 22 Q. That is, other than the email where -- or, excuse  
02:05:18 23 me, text message where Mr. Dillon said he had spoke with  
02:05:23 24 them?

02:05:23 25 A. Right.

02:05:24 1 Q. And following your receipt of that you confirmed  
02:05:27 2 that he was not represented by them, right?

02:05:32 3 A. Right.

02:05:33 4 MR. HUNT: Thank you, Ms. Whitlock. I don't  
02:05:35 5 have anything further.

02:05:36 6 THE WITNESS: Okay.

02:05:40 7 THE COURT: Any questions?

02:05:40 8 MS. HERNANDEZ: Yes, Your Honor. Just a few  
02:05:40 9 questions.

02:05:41 10 - - -

02:05:41 11 ERIN WHITLOCK, CROSS-EXAMINATION

02:05:42 12 BY MS. HERNANDEZ:

02:05:42 13 Q. Ms. Whitlock, did you tell Mr. Dillon in your  
02:05:49 14 first telephonic discussion with him that you would be  
02:05:52 15 recording the discussion?

02:05:53 16 A. No.

02:05:55 17 Q. Did you, before asking him questions about his  
02:05:59 18 employment with defendant An, did you explain the nature  
02:06:04 19 of the lawsuit?

02:06:05 20 A. Again, that would be something that Sarah St.  
02:06:10 21 Pierre would have gone over. And, you know, I think we  
02:06:15 22 had kind of a script for her to go over. And that's why  
02:06:20 23 when she called she wanted to make sure that he wasn't  
02:06:23 24 confused with who we represented. But I did not talk  
02:06:26 25 about that, no.

02:06:27 1 Q. Did you explain that the action brought by Wai  
02:06:35 2 Man Tom was brought as a collective class action?

02:06:37 3 A. I did not, no.

02:06:39 4 Q. Did you explain to him that he could be a  
02:06:42 5 potential class member in the action?

02:06:45 6 A. No.

02:06:47 7 Q. Did you ask him if he was represented by counsel?

02:06:52 8 A. I believe that Ms. St. Pierre had asked that. I  
02:06:57 9 did not, no.

02:07:00 10 Q. Did you explain to him that upon completion of  
02:07:07 11 the questions with him that you would be -- that you  
02:07:13 12 would have him sign a declaration and that he would get  
02:07:18 13 a copy of it prior to actually signing it?

02:07:26 14 A. Are you speaking about when we met with him in  
02:07:28 15 person?

02:07:29 16 Q. First I'm speaking about your initial telephonic  
02:07:32 17 discussion with him.

02:07:33 18 A. Uh-huh.

02:07:36 19 Q. Did you explain to him that you would be  
02:07:39 20 gathering the information -- strike that question.

02:07:43 21 Did you explain to him the nature of why you  
02:07:49 22 wanted to speak with him?

02:07:51 23 A. I guess I'm not clear on your question. I asked  
02:07:56 24 him if he would be willing to give a statement. But at  
02:07:59 25 that time we hadn't -- that was all I asked him in

02:08:04 1 relation to my talking to him.

02:08:05 2 Q. Okay. Let me rephrase the question. Did you  
02:08:09 3 explain to him why you wanted to speak with him?

02:08:14 4 A. I don't believe so. I may have just said talk  
02:08:19 5 about your employment. I don't know.

02:08:24 6 Q. And, Ms. Whitlock, turning your attention to the  
02:08:30 7 Defendant's Exhibit Number 3, which are the text  
02:08:39 8 messages between you and Mr. Justin Dillon.

02:08:44 9 A. Uh-huh.

02:08:45 10 Q. If you look at the very first page of the text  
02:08:49 11 messages which I believe you started on March 14 -- am I  
02:08:53 12 reading that correctly?

02:08:54 13 A. Yes. Uh-huh.

02:08:55 14 Q. And I guess the first text message from you to  
02:08:58 15 him was, "Hey Justin, it's Erin Whitlock. We spoke last  
02:09:03 16 week about the An case. Do you have time to grab a  
02:09:06 17 coffee or something on Monday?"

02:09:08 18 Did I read that correctly?

02:09:09 19 A. Yes.

02:09:09 20 Q. Then he answered, "That's fine, downtown?"

02:09:13 21 Did I read that correctly?

02:09:14 22 A. Yes.

02:09:15 23 Q. Then if you go down to the bottom where he  
02:09:18 24 indicates, "Which one ... I work downtown, don't really  
02:09:21 25 get to explore."



02:09:22 1 Your response was, "Hahah. Hear ya!"

02:09:25 2 Did I read that correctly?

02:09:27 3 A. Yes.

02:09:27 4 Q. Is that the way that you normally communicate  
02:09:29 5 with putative plaintiffs in these types of cases?

02:09:34 6 A. Yeah. Yes, I guess. I mean, I was just being  
02:09:40 7 friendly.

02:09:42 8 Q. And then if you look at the next page of the text  
02:09:46 9 messages where he says, "See you Monday."

02:09:51 10 You say, "Okay cool see you there!"

02:09:54 11 Did I read that correctly?

02:09:55 12 A. Yes.

02:09:56 13 Q. Again, that's just the way you would normally  
02:09:58 14 communicate with a putative class member, you  
02:10:02 15 representing the defendant?

02:10:03 16 A. Well, it's the way I would just communicate with  
02:10:06 17 anybody.

02:10:07 18 Q. But even in a professional context that's how you  
02:10:10 19 would communicate with someone?

02:10:12 20 A. Yes.

02:10:12 21 Q. In an adversarial context?

02:10:15 22 A. That's just how I would communicate with people  
02:10:17 23 in general. That's how I talk.

02:10:20 24 Q. And during the course of your communications with  
02:10:25 25 Mr. Dillon, both telephonically and in person, was there

02:10:32 1 an explanation about the allegations that were made in  
02:10:37 2 the first amended complaint by Mr. Wai Man Tom?

02:10:41 3 A. Not by myself. I have understanding and was  
02:10:44 4 present for one explanation.

02:10:52 5 MS. HERNANDEZ: Ms. Whitlock, I have no  
02:10:54 6 further questions.

02:10:56 7 MR. HUNT: Nothing further, Your Honor.

02:10:57 8 THE COURT: You can step down. Thank you.  
02:11:00 9 Any other witness?

02:11:01 10 MR. HUNT: Yes. One brief witness, I think,  
02:11:03 11 Your Honor. Ms. Fishman.

02:11:43 12 THE CLERK: Please come forward and stand in  
02:11:45 13 front of the clerk's bench.

02:11:48 14 Place your left hand on the Bible and raise  
02:11:50 15 your right hand. State your name for the Court.

02:11:53 16 THE WITNESS: Jordan Fishman.

02:11:53 17 THE CLERK: Spell your name for the Court.

02:11:56 18 THE WITNESS: J-o-r-d-a-n F-i-s-h-m-a-n.

02:12:01 19 (Whereupon the witness was sworn by the  
02:12:07 20 clerk.)

02:12:07 21 THE CLERK: Thank you. Please take the  
02:12:09 22 witness stand and be seated.

02:12:17 23 - - -

02:12:17 24 JORDAN FISHMAN, DIRECT EXAMINATION

02:12:18 25 BY MR. HUNT:

02:12:18 1 Q. Ms. Fishman, what do you do?

02:12:25 2 A. Sorry?

02:12:26 3 Q. What do you do?

02:12:27 4 A. I'm an attorney.

02:12:28 5 Q. Where do you work?

02:12:29 6 A. I work at a law firm called Stokes Wagner.

02:12:33 7 Q. Where is that located?

02:12:34 8 A. It's -- well, I practice in Atlanta. We have  
02:12:37 9 offices all over the country.

02:12:39 10 Q. You have worked on a case involving Wai Man Tom  
02:12:44 11 and Brandon Kelly versus An, North Carolina Culinary and  
02:12:53 12 SAS, and other defendants?

02:12:54 13 A. Yes.

02:12:56 14 Q. During the course of that work did you have an  
02:12:59 15 occasion to speak with Justin -- a gentleman by the name  
02:13:02 16 of Justin Dillon?

02:13:04 17 A. Yes, I did.

02:13:05 18 Q. When was the first time you spoke to Mr. Dillon?

02:13:09 19 A. The first time I spoke with Mr. Dillon was on  
02:13:12 20 March 19 around 2:30 in the afternoon at a Starbucks in  
02:13:18 21 Raleigh.

02:13:19 22 Q. How did you come to speak with him on that day?

02:13:23 23 A. My paralegal, Erin Whitlock, had spoken with him  
02:13:28 24 on the phone previously, and she set up the interview.

02:13:35 25 Q. During the discussions with Mr. Dillon prior to

02:13:40 1 the meeting, was he told that he -- one of the purposes  
02:13:49 2 of the meeting would be to obtain a statement from him?

02:13:51 3 A. Yes. Erin Whitlock informed me that when she  
02:13:55 4 spoke with him, she told him about the background of the  
02:13:58 5 case and said that she -- we wanted to meet with him to  
02:14:01 6 get a statement.

02:14:02 7 Q. When you met with Mr. Dillon at Starbucks, did  
02:14:06 8 you also tell him that?

02:14:08 9 A. Sorry?

02:14:08 10 Q. When you met with Mr. Dillon at the Starbucks,  
02:14:11 11 did you also tell him that you wanted to obtain a  
02:14:14 12 statement from him?

02:14:15 13 A. Yes.

02:14:19 14 Q. On that day who arrived first at the restaurant?

02:14:22 15 A. Erin Whitlock and I arrived first at the  
02:14:25 16 Starbucks and just sat down at one of the larger tables  
02:14:30 17 there that had six chairs at it and set up our laptops.

02:14:37 18 Q. Mr. Dillon arrived how much later?

02:14:40 19 A. I don't recall exactly how much later. I think  
02:14:44 20 it was five or ten minutes.

02:14:46 21 Q. And how did you know it was him?

02:14:48 22 A. He was kind of searching around. He looked like  
02:14:53 23 a person that was kind of searching around looking for  
02:14:57 24 someone. And he kind of walked over to us, and I think  
02:14:59 25 we said, you know: Justin?

02:15:05 1 And he said: Oh, hi.

02:15:07 2 And I think he said -- he either said: Are you  
02:15:10 3 Erin? Or, Erin?

02:15:12 4 And we introduced ourselves.

02:15:15 5 Q. How did you introduce yourself?

02:15:18 6 A. Initially I stood up and I just said: I'm Jordan  
02:15:22 7 Fishman, nice to meet you. And Erin shook his hand, I  
02:15:26 8 shook his hand. Then when we sat down I did a more  
02:15:29 9 formal introduction.

02:15:30 10 Q. Could you describe that more formal introduction  
02:15:33 11 for us.

02:15:34 12 A. My formal introduction was similar to  
02:15:38 13 introductions I've done in the past with witness  
02:15:42 14 interviews. I said, you know: Hello/good afternoon, my  
02:15:45 15 name is Jordan Fishman. I'm an attorney with Stokes  
02:15:50 16 Wagner. This is Erin Whitlock; she's my paralegal. We  
02:15:53 17 are representing defendants in this lawsuit that was --  
02:15:58 18 I said: Defendant An Asian Cuisine, a defendant in this  
02:16:05 19 lawsuit that was brought by Brandon Kelly and Wai Man  
02:16:10 20 Tom.

02:16:14 21 Q. Did he appear to be confused in any way to you?

02:16:17 22 A. No.

02:16:17 23 Q. Did he ask you any questions about who you  
02:16:19 24 represented?

02:16:20 25 A. No.

02:16:21 1 Q. Did he express any uncertainty about who your  
02:16:25 2 clients happened to be?

02:16:27 3 A. No, he didn't ask any questions about who my  
02:16:30 4 client was.

02:16:33 5 Q. What occurred next?

02:16:34 6 A. So I explained to him who we were and that we  
02:16:41 7 represented the restaurant. I then -- I said something  
02:16:45 8 along the lines of: I believe when you spoke with Erin  
02:16:49 9 Whitlock she told you this is -- you meeting with us is  
02:16:52 10 voluntary. We greatly appreciate you taking time out of  
02:16:55 11 your day to meet with us. We just want to ask you a  
02:16:59 12 couple questions about the factual allegations in the  
02:17:06 13 complaint that was filed by the plaintiffs. We're  
02:17:09 14 interested in the truth and only the truth.

02:17:11 15 So I think I also advised him that I was taking  
02:17:15 16 notes in real time on my laptop. And I told him that  
02:17:20 17 I'm going to take notes in real time so that I can try  
02:17:23 18 to get as accurate of a statement as possible.

02:17:27 19 Q. You said that at the outset of the conversation?

02:17:29 20 A. Yes.

02:17:30 21 Q. What kinds of questions or what kinds of topics  
02:17:34 22 did you ask him about during your meeting?

02:17:37 23 A. As I've done with other witness interviews, I  
02:17:43 24 ask -- I kind of start with: When did you work at An?  
02:17:49 25 What was your position at An? Where have you worked

02:17:53 1 previously?

02:17:53 2           So he spent some time talking about his previous  
02:17:58 3 employers and the positions he's held for his previous  
02:18:01 4 employers. I believe it's in his declaration he was a  
02:18:06 5 Swiss Army knife for one of his employers. I didn't  
02:18:09 6 know what that meant, so I asked him. Basically meaning  
02:18:12 7 he had worked in every position in the restaurant. So  
02:18:14 8 we talked about that for a while, and then started  
02:18:19 9 focusing on: Has he worked with Nick Pappas? He said  
02:18:25 10 he had; he said he trained with him. I asked him about  
02:18:28 11 what kind of training he did with Nick. Then I got into  
02:18:34 12 whether Nick was out in the front of the house. I asked  
02:18:40 13 him for the facts regarding Nick and his involvement in  
02:18:45 14 serving customers. I asked him about the sushi chefs  
02:18:51 15 and whether they spoke English, whether they interacted  
02:18:55 16 with guests. I asked him questions -- well, I guess at  
02:19:00 17 the beginning when I told him what the lawsuit was  
02:19:02 18 about, that it was about allegations regarding an  
02:19:06 19 improper tip pooling arrangement, he expressed to me  
02:19:11 20 that he, throughout the course of our interview, that he  
02:19:14 21 thought all tip pools were illegal. Obviously I didn't  
02:19:19 22 feel inclined to give him legal advice on that. I just  
02:19:22 23 said: We've taken the position that the tip pool at An  
02:19:25 24 was legal. And so I think that was the majority of the  
02:19:30 25 topics that we covered.

02:19:32 1 Q. How did the meeting end?

02:19:35 2 A. The meeting ended with me saying, you know, thank  
02:19:39 3 you so much for your time. As I discussed earlier, I've  
02:19:43 4 been typing all of this in real time on my laptop. I  
02:19:47 5 want you to review everything that I've written to make  
02:19:52 6 sure that it's 100 percent accurate. If you believe  
02:19:55 7 that I've misstated anything, please feel free to  
02:19:58 8 correct it. I'm going to literally hand you my laptop  
02:20:02 9 so you can make any edits that you wish.

02:20:05 10 So then I proceeded to turn my laptop around, and  
02:20:09 11 he sat there looking at my laptop reviewing the  
02:20:13 12 statement, which is, I believe, like, a page and a half  
02:20:16 13 long. And so he had the opportunity to change it  
02:20:20 14 himself, but he actually asked me to make the changes.  
02:20:23 15 So we kind of just looked on together, and he told me to  
02:20:27 16 change the spelling of a restaurant that he had worked  
02:20:30 17 at. He told me to add Wai where I had just had Brandon  
02:20:38 18 because he said he didn't want to single anyone out. So  
02:20:41 19 I said okay, so I added Wai's name where I had Brandon's  
02:20:46 20 name.

02:20:46 21 Then he also asked me to change the wording of --  
02:20:52 22 one of the paragraphs in the last page because I think  
02:20:55 23 he said that he didn't like the way it sounded. So I  
02:21:02 24 did all those changes that he asked me to do.

02:21:04 25 And then Erin -- I said that our printer wasn't



02:21:12 1 working, or Erin said -- one of us told him our printer  
02:21:16 2 wasn't working, so we were going to go to the Marriott  
02:21:20 3 next door to print out the statement. So Erin went and  
02:21:24 4 printed out the statement. I sat there with him.

02:21:27 5 And I don't remember exactly what we discussed,  
02:21:30 6 but we were talking about his family. He talked about  
02:21:32 7 his sister and how he looked up to her. She had  
02:21:36 8 multiple degrees. And then he was talking about some  
02:21:39 9 race that she runs where her and other people -- it's  
02:21:43 10 kind of a social thing where they run, then they get to  
02:21:47 11 a stopping point and drink a beer and keep running. So  
02:21:51 12 I don't remember what else we talked about, but I  
02:21:53 13 remember us talking about his sister and her  
02:21:56 14 accomplishments.

02:21:57 15 And then Erin came back from the Marriott with  
02:22:02 16 the printed out statement, and he looked over the  
02:22:07 17 statement again. You know, I said: Again, please look  
02:22:10 18 over this, make sure it's accurate. And then he signed  
02:22:13 19 the statement.

02:22:19 20 Q. You referred to him making a number of changes to  
02:22:24 21 the affidavit. Did the changes amount to two pages  
02:22:27 22 worth of changes?

02:22:28 23 A. No.

02:22:29 24 Q. Did they amount to two paragraphs worth of  
02:22:31 25 changes?

02:22:32 1 A. No.

02:22:33 2 Q. Were they just a few words here and there that he  
02:22:37 3 changed?

02:22:37 4 A. Yes. A few words here and there, then I deleted  
02:22:41 5 a sentence, or I changed the wording of a sentence.

02:22:43 6 Q. Toward the end of the meeting or as the meeting  
02:22:46 7 was ended, what, if any, kind of gestures did Mr. Dillon  
02:22:49 8 make?

02:22:51 9 A. He --

02:22:54 10 MS. HERNANDEZ: Objection. Form.

02:22:57 11 THE COURT: You can answer it. Do you  
02:23:01 12 understand the question?

02:23:03 13 THE WITNESS: Yes.

02:23:04 14 A. He threw his middle fingers up and said: F'  
02:23:10 15 them. And I believe that was in reference to An, saying  
02:23:15 16 F' them to An. And: I hope Tom and Brandon, you know,  
02:23:19 17 get money from this.

02:23:24 18 Q. After he was shown the printed declaration, did  
02:23:28 19 you give him an opportunity to review it?

02:23:30 20 A. Yes.

02:23:32 21 Q. How much time did he take to review the printed  
02:23:35 22 declaration?

02:23:36 23 A. Four or five minutes. It wasn't long. It was a  
02:23:40 24 page and a half. So I think four or five minutes. He  
02:23:43 25 could have had as much time as he wanted; I just sat

02:23:46 1 back and let him read it.

02:23:47 2 Q. Did he appear to be rushed in any way?

02:23:50 3 A. No.

02:23:50 4 Q. Did you tell him he had to be done by a  
02:23:52 5 particular time?

02:23:53 6 A. No.

02:23:53 7 Q. Did you tell him you had to be somewhere at any  
02:23:56 8 particular time?

02:23:57 9 A. No.

02:23:57 10 Q. Did he voluntarily end the meeting?

02:24:00 11 A. Sorry.

02:24:01 12 Q. Did he voluntarily end the meeting?

02:24:06 13 A. Yes. Right. He signed is it, and then I think  
02:24:10 14 we all casually said bye to each other, and I said thank  
02:24:15 15 you. It was a very casual ending to the meeting.

02:24:19 16 Q. Have you had any further contact with Mr. Dillon  
02:24:22 17 since that time?

02:24:23 18 A. No.

02:24:26 19 MR. HUNT: Thank you, Ms. Fishman. I don't  
02:24:28 20 have any further questions.

02:24:29 21 MS. HERNANDEZ: Thank you, Your Honor I just  
02:24:30 22 have a few follow-up questions for Ms. Fishman.

02:24:34 23 - - -

02:24:34 24 JORDAN FISHMAN, CROSS-EXAMINATION

02:24:36 25 BY MS. HERNANDEZ:

02:24:36 1 Q. Would you prefer that I refer to you as Ms. Arkin  
02:24:39 2 or Ms. Fishman?

02:24:40 3 A. So, yes. You can refer to me as Fishman. Arkin  
02:24:44 4 is on my declaration because I haven't legally changed  
02:24:47 5 my last name yet, just due to flights being booked under  
02:24:51 6 my unmarried name.

02:24:53 7 Q. Thank you, Ms. Fishman. Do you recall if in your  
02:24:57 8 meeting with Mr. Dillon, did you hand him a copy of the  
02:25:02 9 first amended complaint?

02:25:04 10 A. I did not.

02:25:06 11 Q. Did you explain to him the nature of the named  
02:25:11 12 plaintiff's allegations against your clients, the  
02:25:14 13 defendants?

02:25:15 14 A. I generally explained it. I didn't say there  
02:25:18 15 were four counts in the complaint and these are the  
02:25:21 16 counts in the complaint, but I said that a lawsuit was  
02:25:23 17 brought by Brandon Kelly and Wai Man Tom against the  
02:25:28 18 restaurant. Basically they've asserted claims against  
02:25:32 19 the restaurant based on an alleged improper tip pooling  
02:25:36 20 arrangement or improper tip pooling practices. I said  
02:25:40 21 one of the two.

02:25:41 22 Q. Did you explain to them that it was brought as a  
02:25:43 23 collective class action and that he could potentially be  
02:25:47 24 a putative class member in this action?

02:25:50 25 A. I don't recall if I did.

02:25:54 1 Q. Do you recall explaining to him that his rights  
02:26:01 2 could be affected by speaking with you?

02:26:04 3 A. No.

02:26:05 4 Q. Did you ask him if he was represented by counsel?

02:26:09 5 A. I don't recall if I did, but I have in my  
02:26:19 6 previous interviews. So sitting here today I don't  
02:26:24 7 recall if I did, but I have before, so it makes me think  
02:26:27 8 I probably did as my normal practice.

02:26:30 9 I do recall looking at PACER, it was either that  
02:26:33 10 morning or the morning before that, and seeing that he  
02:26:35 11 hadn't filed a consent to sue.

02:26:39 12 Q. Do you recall asking him if he had a right to  
02:26:43 13 have counsel present during the course of his discussion  
02:26:46 14 with you?

02:26:47 15 A. No.

02:26:47 16 Q. Did you explain to him the purpose of the meeting  
02:26:51 17 with you?

02:26:53 18 A. I told him that the purpose of him meeting with  
02:26:55 19 us is for us to find out the truth regarding the  
02:26:59 20 allegations that were alleged in the complaint that was  
02:27:03 21 filed against the restaurant.

02:27:05 22 Q. Did you explain to him that the information that  
02:27:08 23 you would be gathering could be used in this action  
02:27:12 24 against the plaintiffs?

02:27:16 25 A. I don't think I explicitly said: The information

02:27:20 1 you give us will be used against you. But I did say  
02:27:23 2 that we are collecting statements in connection with  
02:27:26 3 this lawsuit.

02:27:28 4 Q. So did you or did you not explain to him that you  
02:27:32 5 would be utilizing those statements in this action?

02:27:36 6 A. Yes, I did. I said: We plan on using these  
02:27:41 7 statements in connection with the litigation.

02:27:43 8 Q. You did explain that to him?

02:27:45 9 A. Yes.

02:27:48 10 Q. And just for the record, Ms. Fishman, that  
02:27:51 11 information is not in your declaration, that you  
02:27:55 12 specifically advised him of such information.

02:27:58 13 MR. HUNT: Objection.

02:28:00 14 THE COURT: Is that a question?

02:28:02 15 MS. HERNANDEZ: I'm sorry, Your Honor.

02:28:04 16 Strike that. It's just a comment/statement/observation,  
02:28:09 17 if you will.

02:28:10 18 BY MS. HERNANDEZ:

02:28:11 19 Q. Now, did you also advise Mr. Dillon that he would  
02:28:15 20 be -- he could take the declaration home with him to  
02:28:18 21 review it before signing it?

02:28:20 22 A. No.

02:28:24 23 Q. Did you explain to him the nature of the  
02:28:30 24 statement, signing under penalty of perjury and its  
02:28:33 25 legal significance?

02:28:35 1 A. I made a comment about this being a sworn  
02:28:40 2 statement, which is why I wanted it to be 100 percent  
02:28:45 3 accurate and truthful. And I believe that came up twice  
02:28:49 4 during our conversation where I said: I'm looking for  
02:28:52 5 the truth. I'm typing this up. I hope it's accurate.  
02:28:56 6 If it's not, this is a sworn statement, so I want you to  
02:29:00 7 have the opportunity to correct it, correct any  
02:29:03 8 misstatements.

02:29:04 9 Q. So, Ms. Fishman, thank you very much for that,  
02:29:07 10 but it's a very simple yes-or-no answer. Did you  
02:29:10 11 explain to Mr. Dillon the significance of that  
02:29:14 12 statement, signing under penalty of perjury?

02:29:18 13 MR. HUNT: Objection. Ambiguous.

02:29:20 14 THE COURT: Overruled.

02:29:22 15 A. I explained to him that it was a sworn statement  
02:29:26 16 that he was signing. And I believe it also says "Under  
02:29:29 17 penalty of perjury" right above where he signed. But  
02:29:34 18 yes, I did explain to him that it was a sworn statement.

02:29:36 19 Q. Did you explain to him what a sworn statement  
02:29:39 20 means?

02:29:40 21 A. No.

02:29:53 22 Q. Did you also -- did you explain to him that by  
02:29:57 23 speaking with you or signing that declaration under  
02:29:59 24 penalty of perjury could actually -- could potentially  
02:30:03 25 limit any potential rights that he might have in the

02:30:05 1 action?

02:30:06 2 A. No.

02:30:11 3 MS. HERNANDEZ: Ms. Fishman, thank you very  
02:30:12 4 much. I have no further questions.

02:30:15 5 THE COURT: Any redirect?

02:30:17 6 MR. HUNT: No, Your Honor.

02:30:18 7 THE COURT: Thank you. You can step down.

02:30:20 8 And if you want to bring both your paralegal and have  
02:30:23 9 the attorney stay in the courtroom at this point, I  
02:30:26 10 don't think they're going to be recalled.

02:30:29 11 MR. HUNT: Thank you, Your Honor.

02:30:33 12 THE COURT: Any further evidence?

02:30:34 13 MR. HUNT: No, Your Honor, only that in  
02:30:42 14 connection with our response, we did submit a  
02:30:44 15 declaration from Ms. St. Pierre, who is the receptionist  
02:30:50 16 in our office, and I would like the Court to receive  
02:30:53 17 that into evidence.

02:30:54 18 THE COURT: Okay. So noted.

02:30:58 19 Anything else?

02:30:58 20 MR. HUNT: Other than that, no, Your Honor.

02:31:00 21 THE COURT: Do you want to make your closing  
02:31:02 22 argument?

02:31:03 23 MS. HERNANDEZ: Yes, Your Honor. Just a  
02:31:04 24 couple of minutes.

02:31:09 25 THE COURT: You can be seated. And we close



02:31:11 1 off the screens now, take them down, having heard all  
02:31:17 2 the evidence.

02:31:23 3 MS. HERNANDEZ: Your Honor, I think the  
02:31:24 4 evidence here certainly shows that while this wasn't  
02:31:30 5 anything like Quezada where people were being called  
02:31:34 6 over a loud speaker and being asked to meet in some  
02:31:38 7 room, dark room with just managers, the similarities  
02:31:42 8 relate to the context of the information that was being  
02:31:47 9 given to these individuals, the putative class members,  
02:31:54 10 and insuring that they fully understood the nature and  
02:31:58 11 the purpose of the meeting and how the evidence would be  
02:32:01 12 used in their own involvement -- own potential  
02:32:05 13 involvement in the action, Your Honor.

02:32:06 14 THE COURT: Don't you agree that I've got to  
02:32:10 15 make some credibility decisions here? Because there was  
02:32:12 16 a very different picture painted by Mr. Dillon versus  
02:32:16 17 painted by defense counsel and the paralegal from the  
02:32:22 18 witness stand. There was internal inconsistency within  
02:32:27 19 the testimony of Mr. Dillon. Do you want to talk about  
02:32:33 20 that?

02:32:34 21 MS. HERNANDEZ: Your Honor, simply I think  
02:32:38 22 that there are a lot of consistencies in terms of the  
02:32:43 23 information based on the recording of the discussion,  
02:32:48 24 the telephonic discussion. And there's no indication  
02:32:53 25 from Ms. St. Pierre's declaration that she fully

02:32:59 1 explained the nature of the lawsuit to Mr. Dillon or  
02:33:03 2 that Ms. Whitlock explained the nature of the lawsuit to  
02:33:07 3 Mr. Dillon and how his rights could be affected.

02:33:09 4 And this, Your Honor, is obviously very --  
02:33:13 5 it's perplexing. It is surprising because, again, given  
02:33:18 6 the impending motion for conditional class  
02:33:21 7 certification, it's important that counsel simply allow  
02:33:27 8 the Court to rule on such a motion so that the notice  
02:33:32 9 that is going out to these putative plaintiffs if the  
02:33:35 10 Court, again, rules in granting the motion for notice  
02:33:38 11 and certification that they're getting timely and  
02:33:41 12 accurate notice and that they understand when they're  
02:33:44 13 reading the notice how that can potentially affect them  
02:33:48 14 in making decisions on whether or not they wish to  
02:33:51 15 participate.

02:33:52 16 But I think that in looking at all of the  
02:33:56 17 evidence, including the testimony, I think that there is  
02:34:00 18 a lot of information that just was not fully disclosed.  
02:34:04 19 And from a third party kind of spectator position it  
02:34:11 20 would suggest that defendants had basically had a desire  
02:34:17 21 to somehow circumvent the Court's authority, usurping  
02:34:22 22 the Court's authority in making a determination about  
02:34:24 23 this collective class action whether or not to be  
02:34:27 24 certified and giving people notice.

02:34:30 25 So if the Court finds that the defendants'

02:34:34 1 communications were, in fact, improper, plaintiffs ask  
02:34:38 2 that the Court certainly grant the motion for protective  
02:34:44 3 order, precluding prospective communications with  
02:34:48 4 putative class members, essentially precluding the usage  
02:34:53 5 of these declarations in support of a motion for partial  
02:34:56 6 summary judgment that is anticipated in terms of filing  
02:34:59 7 by the defendants or in opposition to plaintiff's motion  
02:35:02 8 for conditional class certification. And also that  
02:35:09 9 these putative class members receive some sort of  
02:35:11 10 corrective notice which can also be utilized in the  
02:35:14 11 actual notice in support of the motion for class cert  
02:35:20 12 should the Court grant it.

02:35:22 13 This is now the third time, Your Honor, I've  
02:35:24 14 had to file a motion for protective order. And in both  
02:35:27 15 cases there was more information given by defendant's  
02:35:30 16 counsel than was done here. So I hope, Your Honor, that  
02:35:33 17 you will at least take all of the information, all of  
02:35:35 18 the evidence into consideration and insure that there's  
02:35:41 19 a levelled playing field, if you will.

02:35:45 20 Thank you very much.

02:35:46 21 THE COURT: All right. Thank you, counsel.

02:35:48 22 Do you wish to be heard?

02:35:49 23 MR. HUNT: Yes, Your Honor. Just briefly.

02:35:53 24 I think as Your Honor pointed out, there are some  
02:35:57 25 internal inconsistencies in what Mr. Dillon said versus

02:36:01 1 what he told the Court in the affidavit that plaintiff's  
02:36:04 2 counsel filed with the motion. For one thing, it  
02:36:07 3 appears that he knew from the get-go that he was being  
02:36:11 4 interviewed and talked -- or he was speaking with the  
02:36:14 5 defendant's law firm. And there really wasn't any  
02:36:17 6 confusion in his mind as to where everybody stood and  
02:36:21 7 what their relative positions were. So he knew exactly  
02:36:25 8 what the story was, so to speak, in terms of who was  
02:36:29 9 asking questions and what kind of information was being  
02:36:33 10 requested. He also was aware of the lawsuit. He'd  
02:36:38 11 known that for at least a year. Apparently he and Mr.  
02:36:42 12 Kelly or he and Mr. Tom were friends, and apparently he  
02:36:47 13 reached out to them right after his conversation with  
02:36:50 14 Ms. Fishman. Nevertheless, he went ahead and still  
02:36:53 15 executed -- he didn't change the affidavit. He'd  
02:36:58 16 already signed it by that time.

02:37:00 17 I think the facts show this was a completely  
02:37:02 18 voluntary interview on his part. There's no evidence of  
02:37:06 19 any coercion. There's no evidence of any promises to  
02:37:10 20 him. In fact, in terms of the questions that were  
02:37:14 21 asked, if one reviews this transcript of the telephone  
02:37:18 22 conversation, practically every single question is  
02:37:21 23 either "how," "why," "what," "where," "when?" They're  
02:37:26 24 all completely open-ended. I don't think there's one  
02:37:29 25 leading question in here. None of these suggested any

02:37:32 1 outcome. They were simply attempts to obtain facts and  
02:37:35 2 information from Mr. Dillon.

02:37:38 3 And when Ms. Fishman or Ms. Whitlock met  
02:37:42 4 with him, they proceeded to follow up on that  
02:37:44 5 conversation. Ms. Whitlock already had one. And they  
02:37:48 6 asked him more or less the same kinds of questions,  
02:37:52 7 factual information about what his employment experience  
02:37:55 8 had been with An. And at the end of that conversation  
02:37:58 9 they had him or asked him if he would sign a statement,  
02:38:02 10 which he did. And they gave him a chance to review it.  
02:38:05 11 By his own admission, he did review it. He claims he  
02:38:08 12 made -- I think he said two pages worth of changes; Ms.  
02:38:13 13 Fishman and Ms. Whitlock obviously say that's not true,  
02:38:18 14 he changed a few words here and there, and that was the  
02:38:21 15 extent of it.

02:38:22 16 But I think even more, once the Court heard  
02:38:28 17 Ms. Whitlock and Ms. Fishman's version of it, after this  
02:38:31 18 was all said and done, and he had reached out to Ms.  
02:38:35 19 Whitlock again, initially he said he wanted to make  
02:38:38 20 changes to his affidavit. Well, he didn't make any. He  
02:38:41 21 expressly said: Well, no, I'm not going to make any  
02:38:44 22 changes. I think he said: I was just sort of going  
02:38:48 23 over it in my mind. Well, that doesn't amount to  
02:38:51 24 coercion. It doesn't amount to undue influence.  
02:38:53 25 There's nothing that occurred during the course of this

02:38:56 1 interview that would be improper under the Manual for  
02:39:00 2 Complex Litigation and its section on what kinds of  
02:39:04 3 things defense counsel can ask during precertification  
02:39:08 4 interviews. I don't think there's anything that even  
02:39:11 5 comes close to one of those.

02:39:13 6           So with the greatest respect we urge that  
02:39:16 7 the plaintiff's motion be denied. I don't think it  
02:39:21 8 meets -- comes anywhere close to meeting the high  
02:39:23 9 standard that would require judicial intervention at  
02:39:26 10 this point.

02:39:27 11           I'd also add that at this point there are no  
02:39:30 12 more witness interviews to be done. We have reached the  
02:39:34 13 point in the case where we're in the process of  
02:39:37 14 responding to the plaintiff's motion for certification.  
02:39:40 15 So the record, more or less, at this juncture is fixed.  
02:39:43 16 And there really isn't anything to be gained from a  
02:39:49 17 further order regarding communications outside of one  
02:39:54 18 the Court might issue if it were inclined to grant the  
02:39:57 19 motion for initial certification.

02:39:59 20           So all that being said, we respectfully ask  
02:40:01 21 that the motion be denied.

02:40:02 22           THE COURT: Okay. Well, this could only be  
02:40:17 23 decided with benefit of a hearing, and that hearing has  
02:40:22 24 been held. And I do not believe at this point in time  
02:40:26 25 that involvement by the Court is appropriate, and so I

02:40:29 1 deny the plaintiff's motion.

02:40:32 2           There's not been sufficient credible  
02:40:34 3 consistent testimony that would meet the standard for  
02:40:37 4 Court intervention or for striking Mr. Dillon's  
02:40:41 5 affidavit that defendant is going to rely on. These  
02:40:48 6 weren't misleading or intimidating communications by the  
02:40:53 7 defendant. It is a finding that I make that Mr. Dillon  
02:40:59 8 knew he was talking to defense counsel. He knew that  
02:41:03 9 based on the recorded -- the contacts with the law firm  
02:41:09 10 by telephone, and it was reiterated to him at the  
02:41:13 11 meeting at the Starbucks at the Marriott on Fayetteville  
02:41:19 12 Street. I find defense counsel's testimony very  
02:41:22 13 convincing. And I think ultimately Mr. Dillon admitted  
02:41:26 14 it on the witness stand that he knew he was talking to  
02:41:29 15 defense counsel; he knew there was a lawsuit involving  
02:41:33 16 the restaurant. And I don't find credible his testimony  
02:41:37 17 that he had to revise two and a half pages of his  
02:41:40 18 affidavit. That's just not been shown. Simply not  
02:41:47 19 being clear on a certain point that would be a more  
02:41:53 20 expansive explanation of the lawsuit or a more involved  
02:41:58 21 explanation of Mr. Dillon's potential involvement  
02:42:01 22 doesn't rise to the level of warranting a Court  
02:42:05 23 intervention. He knew there was a lawsuit against An.  
02:42:09 24 He knew his testimony was going to be relied on. He had  
02:42:14 25 an opportunity to review it, including the oath block,

02:42:26 1 knowing -- with the opportunity to ask questions about  
02:42:29 2 the sworn aspect of his testimony. And when he asked  
02:42:36 3 for his copy of his affidavit, it ultimately was  
02:42:40 4 provided, and he didn't have any changes.

02:42:43 5 I think he appears conflicted about what he  
02:42:47 6 has or hasn't done in this case. He's obviously friends  
02:42:50 7 with the two individuals, Mr. Tom and the other. And he  
02:42:59 8 wasn't a very convincing witness in terms of a  
02:43:06 9 presentation that this was coercive, intimidating  
02:43:10 10 communication. Really even by his own testimony he  
02:43:13 11 undercut that. So no, the relief that plaintiff  
02:43:21 12 requests is not allowed.

02:43:23 13 So in four days your response is due; is  
02:43:28 14 that right?

02:43:28 15 MR. HUNT: Yes, Your Honor. I believe it's  
02:43:30 16 four business days.

02:43:32 17 THE COURT: So is there anything if we talk  
02:43:33 18 about now might bring efficiencies to the case? Is  
02:43:37 19 there anything, plaintiff, you can think about?

02:43:40 20 MS. HERNANDEZ: No, Your Honor, nothing from  
02:43:42 21 the plaintiff.

02:43:43 22 THE COURT: Since we're all together.

02:43:44 23 MR. HUNT: Not pending the Court's ruling on  
02:43:46 24 the upcoming motions, no, Your Honor.

02:43:53 25 (Discussion had off the record.)



02:43:53 1 MR. HUNT: Oh, I guess one item, Your Honor.  
02:44:01 2 Your Honor, in the course of preparing our brief, we may  
02:44:08 3 need an extension of the page limit, the number of  
02:44:12 4 pages. If the Court could give us ten additional pages  
02:44:16 5 on the summary judgment motion, we would greatly  
02:44:20 6 appreciate it.

02:44:21 7 THE COURT: And you're going to file that  
02:44:23 8 within -- at the same time?

02:44:26 9 MR. HUNT: Yes. What we're trying to do,  
02:44:28 10 because a large number of exhibits are the same, we  
02:44:32 11 wanted to make it --

02:44:33 12 THE COURT: It's a unified?

02:44:35 13 MR. HUNT: We were going to try to attempt  
02:44:38 14 to do that so that the same exhibits for summary  
02:44:41 15 judgment are the same exhibits in response to the  
02:44:43 16 plaintiff's motion for --

02:44:46 17 THE COURT: But how does that affect your  
02:44:47 18 briefing?

02:44:48 19 MR. HUNT: Oh, it doesn't. I mean, we're  
02:44:54 20 trying to -- we just need more pages for the motion for  
02:45:01 21 summary judgment is all.

02:45:02 22 THE COURT: Okay. The memorandum?

02:45:04 23 MR. HUNT: Yes, I'm sorry, the memorandum.

02:45:06 24 THE COURT: So you want an extra ten pages?  
02:45:08 25 Well, do you need anything?

02:45:10 1 MS. HERNANDEZ: Your Honor, actually I would  
02:45:12 2 like to respond to that. I would certainly --  
02:45:17 3 plaintiffs would not be opposed to such an extension to  
02:45:19 4 the page limit. However, I do want to address the  
02:45:24 5 earlier question about efficiencies.

02:45:26 6 Now, earlier in the litigation during a case  
02:45:30 7 management discussion Your Honor indicated if plaintiffs  
02:45:36 8 felt that certainly there was a reason to defer ruling  
02:45:39 9 on a motion for summary judgment, that that could be  
02:45:41 10 addressed. In recent joint motions for extension of  
02:45:46 11 time, plaintiffs have made clear that any sort of filing  
02:45:52 12 by the defendants on the motion for partial summary  
02:45:54 13 judgment would not necessarily preclude the plaintiffs  
02:45:59 14 from filing a motion to hold such a brief in abeyance.  
02:46:03 15 So the question, Your Honor, is whether or not we could  
02:46:08 16 file that motion for -- to hold that briefing in  
02:46:12 17 abeyance following the full briefing on the motion for  
02:46:18 18 conditional class cert because what we were thinking at  
02:46:21 19 this point was to file a motion to hold that briefing in  
02:46:25 20 abeyance simultaneously with a response in opposition to  
02:46:29 21 the motion for summary judgment in the event that the  
02:46:33 22 Court would deny the motion to hold the briefing on  
02:46:36 23 summary judgment in abeyance, then at that point the  
02:46:41 24 Court would have plaintiff's opposition brief.

02:46:43 25 Does that make sense, Your Honor? I know

02:46:46 1 that's a mouthful right there.

02:46:47 2 THE COURT: Okay. So on the position of  
02:46:51 3 holding briefing in abeyance to allow the Court to focus  
02:46:56 4 on the certification issue, what's your response?

02:47:00 5 MR. HUNT: Well, Your Honor, I think because  
02:47:04 6 of the nature of the summary judgment motion it may well  
02:47:07 7 be that that will either eliminate or certainly cut into  
02:47:14 8 the certification issue. If the Court were to grant the  
02:47:18 9 motion, that would moot the question of initial  
02:47:21 10 certification, at least on part or all of it. I really  
02:47:25 11 think that the proper way or the best way to address it  
02:47:28 12 would be the way we agreed at the outset, which would be  
02:47:32 13 to file the opposition to certification at the same time  
02:47:36 14 we file the motion for summary judgment. If the  
02:47:39 15 plaintiff believes that she needs to file a Rule 56  
02:47:45 16 request to --

02:47:46 17 THE COURT: Remind me, I agreed that you  
02:47:49 18 could file your summary judgment motion on the same day  
02:47:51 19 that you file your opposition to plaintiff's motion, or  
02:47:55 20 did I set a schedule where you file your summary  
02:47:58 21 judgment motion on the same day that she files her --

02:48:03 22 MR. HUNT: No, the schedule was that we  
02:48:06 23 would file --

02:48:07 24 THE COURT: That's right, with the response.

02:48:09 25 MR. HUNT: Right. When we respond to her

02:48:11 1 motion for initial certification, then we also file for  
02:48:14 2 summary judgment. That's what's due in four business  
02:48:17 3 days. And we think that would be the best way to  
02:48:20 4 proceed.

02:48:22 5 MS. HERNANDEZ: Your Honor, if I may just  
02:48:23 6 briefly respond. There was no specific deadline in  
02:48:27 7 terms of defendant's motion for summary judgment and  
02:48:30 8 when that would be filed. The Court actually went ahead  
02:48:33 9 and basically cited to some authority where plaintiffs  
02:48:38 10 usually file their motion for conditional certification,  
02:48:42 11 class certification first, then any sort of briefing on  
02:48:46 12 merits usually comes in the second phase.

02:48:49 13 Now, in your case management order you  
02:48:51 14 indicated: Having said that, though, this is not  
02:48:54 15 necessarily precluding the defendant's filing of the  
02:48:56 16 motion for summary judgment, but I will determine  
02:48:59 17 whether or not it is appropriate in relationship to  
02:49:02 18 plaintiff's motion for conditional class certification.

02:49:14 19 THE COURT: Which order was that?

02:49:17 20 MR. HUNT: I think she's referring to the  
02:49:20 21 order --

02:49:20 22 MS. HERNANDEZ: I think it was in October,  
02:49:22 23 and it might have been docket 70.

02:49:25 24 THE COURT: I've got that in front of me. I  
02:49:27 25 don't see -- I'm not seeing that language.

02:49:39 1 MS. HERNANDEZ: My colleague, Michael Cohen,  
02:49:41 2 is looking for that.

02:49:42 3 THE COURT: I've got it. It's on page 2.

02:50:11 4 So what I've got is an oral motion. You're  
02:50:14 5 making an oral motion here today?

02:50:15 6 MS. HERNANDEZ: That is correct, Your Honor.

02:50:17 7 THE COURT: And I can't decide it until I  
02:50:20 8 see what the basis is for his summary judgment motion.  
02:50:24 9 So you want me just to let it linger, then I'll make a  
02:50:27 10 decision when I see his summary judgment motion. And  
02:50:33 11 then when I make my decision -- do you want a chance to  
02:50:37 12 brief it, or do you just want to -- I know the grounds  
02:50:40 13 for your request. And what I can do is just -- and I  
02:50:47 14 know you oppose it. And so what I can do is make my  
02:50:51 15 decision when I see his motion whether or not I should  
02:50:56 16 stay your response time or whether or not I feel I need  
02:51:01 17 for you to go ahead and respond to it. Then I'll  
02:51:03 18 trigger your response time from the date that I make  
02:51:06 19 that decision. How about that?

02:51:08 20 MS. HERNANDEZ: Your Honor, I think that  
02:51:09 21 would be perfect. Just because otherwise we're going to  
02:51:12 22 be responding and then filing an opposition brief in  
02:51:15 23 conjunction with a motion -- the briefing in abeyance.  
02:51:19 24 So I think that strategy is perfect.

02:51:22 25 THE COURT: All right. So I won't expect to

02:51:24 1 get any writing from you to convey your oral motion or  
02:51:28 2 the reason for it. I understand it. I understand your  
02:51:30 3 opposition. I'll hold my decision on plaintiff's motion  
02:51:35 4 to stay responsive briefing in abeyance until I see what  
02:51:39 5 you have offered to the Court. And then maybe it will  
02:51:43 6 take me a week to focus on that. And your time is not  
02:51:49 7 ticking away; it won't start ticking until I enter a  
02:51:52 8 short order.

02:51:53 9 MS. HERNANDEZ: Thank you, Your Honor.

02:51:54 10 THE COURT: Now, I want everybody, including  
02:51:56 11 Ms. Collins, to spend a few minutes with Ryan Willett,  
02:52:00 12 who is our IT coordinator here in New Bern. It's not  
02:52:05 13 going to satisfy the training requirement should this  
02:52:09 14 case go to trial. There's a separate training session.  
02:52:12 15 He finds in his experience that if he gives it now, more  
02:52:16 16 often than not it gets forgotten. So it has to do with  
02:52:20 17 dealing with the jury and that kind of thing. But he's  
02:52:22 18 going to give you enough so that if we have another  
02:52:25 19 hearing, it will go a bit more efficiently than it did  
02:52:29 20 today for everybody. Do you want a five-minute break  
02:52:32 21 before he starts up?

02:52:35 22 MR. HUNT: Your Honor, if I may, I have a  
02:52:38 23 personal -- I have a court appearance in New York  
02:52:41 24 tomorrow that I need to catch an airplane for.

02:52:45 25 THE COURT: What time does your plane leave?

02:52:47 1 MR. HUNT: I'm trying to get a 3:00 flight,  
02:52:49 2 but it's from Raleigh.

02:52:51 3 THE COURT: You'd better get going.

02:52:53 4 MR. HUNT: If that would be okay.

02:52:54 5 THE COURT: Well, you get going.

02:52:56 6 MR. HUNT: I'd be happy to come back and  
02:53:00 7 look forward to it.

02:53:01 8 THE COURT: You all can stay? It benefits  
02:53:03 9 you just if you would come to this district again.

02:53:07 10 MR. HUNT: Yes.

02:53:07 11 THE COURT: So go, catch your flight. How  
02:53:09 12 about you?

02:53:10 13 MS. HERNANDEZ: We can absolutely stay, Your  
02:53:12 14 Honor. We have no conflicts whatsoever.

02:53:13 15 THE COURT: Well, I don't make any  
02:53:15 16 predictions as to whether -- but you'd better get on the  
02:53:20 17 road.

02:53:20 18 MR. HUNT: Thank you, Your Honor.

19 (Concluded at 11:40 a.m.)

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**C E R T I F I C A T E**

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled  
matter.

/s/ Tracy L. McGurk\_\_\_\_\_

\_\_\_\_4/28/18\_\_\_\_

Tracy L. McGurk, RMR, CRR

Date



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